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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Petitioners,

v.

JOSEPH STROBL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 2, 1985

QUESTION PRESENTED

The question raised by this petition has never before been presented for review to this Court. It is, in our view, a question of substantial importance which transcends this case.

1. Is there any reason why a speculator in a commodity futures contract should recover treble damages under the federal antitrust laws based exclusively upon an alleged manipulation of the price of that commodity futures contract when: (i) manipulation of a commodities futures contract is proscribed by specific provisions of the Commodity Exchange Act; (ii) Congress three times rejected a treble damage remedy for any conduct proscribed by the Act; and (iii) in almost identical circumstances, antitrust treble damages may not be recovered for manipulation of the price of common stock.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners John R. Simplot, J.R. Simplot Company, Simplot Industries, Inc., P.J. Taggares, P.J. Taggares Company and SimTag Farms (the "Petitioners")[1] request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, dated and entered on July 5, 1985. That judgment and opinion affirmed a final judgment of the United States District Court for the Southern District of New York. Petitioners seek review

1 Pursuant to Rule 28.1 of this Court, petitioners state as follows: the J.R. Simplot Company is a privately held corporation; Simplot Industries, Inc. is a wholly owned subsidiary of the J.R. Simplot Company; SimTag Farms was a private joint venture; and the P.J. Taggares Company is a privately held corporation.

of that portion of the Second Circuit's decision declaring that conduct expressly subject to single damages under specific provisions of the CEA[2] and subject to the regulatory jurisdiction of the Commodity Futures Trading Commission (the "CFTC") can also provide a basis for treble damages under the generic provisions of the federal antitrust laws.

OPINIONS BELOW

The opinion of the court of appeals, reported at 768 F.2d 22 (2d Cir. 1985), is reprinted in the Appendix at A-1.[3] The district court issued two post-trial opinions, reported at 582 F.Supp. 770 (S.D.N.Y. 1984) and 590 F.Supp. 875 (S.D.N.Y. 1984). These opinions are reprinted in the Appendix at A-2 and A-28, respectively.

JURISDICTION

After incurring losses as a result of his speculation in Maine potato futures contracts (A-23; 582 F.Supp. at 772), respondent Joseph Strobl ("Strobl") brought this action in the United States District Court for the Southern District of New York, alleging, in relevant part, federal question jurisdiction under the CEA as well as the Sherman Act (A-65-66). The district court entered final judgment upon a verdict for Strobl awarding, in the alternative, single damages of $460,000 pursuant to Sections 9(b) and 4(a) of the CEA, 7 U.S.C. §§ 13(b) and 6(a), and treble damages of $1,386,000 pursuant to Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act,

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2 References in the form "CEA" refer to the Commodity Exchange Act, as amended by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, *codified* at 7 U.S.C. § 1 *et seq.* Although the CEA was further amended by the Futures Trading Act of 1978, 92 Stat. 865, and by the Futures Trading Act of 1982, 96 Stat. 2294, *codified at* 7 U.S.C. § 1 *et seq.*, such post-1974 amendments to the CEA are not relevant here "because the activities at issue all occurred prior to their enactment." (A-7; 768 F.2d 26.)

3 References in the form "A" refer to pages of the Appendix to this Petition.

15 U.S.C. § 15 (A-53-55). The Court of Appeals for the Second Circuit affirmed the district court's final judgment (A-51-52).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutes, Sections 9(b) and 4(a) of the CEA, 7 U.S.C. §§ 13(b) and 6(a); Section 1 of the Sherman Act, 15 U.S.C. § 1; and Section 4 of the Clayton Act (15 U.S.C. § 15), are reprinted in the Appendix at A-56, A-63, and A-64, respectively.

STATEMENT OF THE CASE

A. Introduction

This case presents this Court with its first opportunity to review the outcome of a private right of action instituted under the CEA which alleged manipulation of a commodity futures contract and which alleged further that this purported manipulation, in and of itself, also gives rise to treble damages under the federal antitrust laws.

B. The 1974 Amendments to the CEA

The 1974 Amendments to the CEA established a "comprehensive regulatory structure" to govern commodity futures markets, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356 (1982); created a new administrative agency—the CFTC—to enforce the CEA (7 U.S.C. § 4a); directed the CFTC to "take into consideration the public interest to be protected by the antitrust laws" in implementing its regulatory mission (7 U.S.C. § 19); and gave the CFTC an arsenal of surveillance, investigatory and other enforcement powers to protect commodity futures markets against anticompetitive behavior (7 U.S.C. §§ 13a-1, 13b, 15, 18), including the manipulation of commodity futures contracts.

To ensure that regulatory standards would be consistently applied to inherently similar industries—the commodities and securities industries—Congress said it "did not want to make the antitrust laws more restrictive in the commodities industry than they are in the securities industry." S. Rep. No. 93-1131, 93d Cong., 2d Sess. at 23 (Aug. 29, 1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5843, 5863.

In line with this intent, Congress thrice rejected a proposed treble damage remedy for practices proscribed by specific provisions of the CEA and subject to the CFTC's regulatory jurisdiction. These proscribed practices include manipulation of commodities futures contracts on a commodities exchange. *See* 7 U.S.C. § 13. The repeated rejection of a treble damage remedy for CEA violations necessarily bars recovery of treble damages in this case especially since "the Commodity Exchange Act clearly governs the activities at issue." (A-10; 768 F.2d at 27).

C. The Trial

Plaintiff Strobl is a wealthy owner of bowling alleys in Detroit. In September and October 1975, acting on speculation that the new crop of Maine potatoes would be substandard, Strobl purchased futures contracts for the delivery of Maine potatoes in May 1976 at an average cost of approximately $18 per cwt (A-5; 768 F.2d at 24; A-35; 582 F.Supp. at 779). Strobl therefore could make money on his speculative investment only if Maine potatoes were worth more than $18 per cwt. by May 1976.

The new Maine potato crop was harvested after Strobl established his "long" position and, contrary to Strobl's guess, was not substandard (A-35; 582 F.Supp. at 779). Supply was such that Maine potatoes sold for approximately $5 per cwt. immediately after harvest and thereafter sold between $5 to $7.50 per cwt. through June 1, 1976.

Because a futures price must rise or fall to meet the actual cash price, *see, e.g., Cargill Inc. v. Hardin*, 452 F.2d 1154,

1157 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); T. Hieronymus, *Economics of Futures Trading* 148, 152 (1971), the price of futures contracts in Maine potatoes inevitably declined from the $18.00 per cwt. Strobl had paid in September 1975. He ultimately liquidated his "long" futures position in late April and early May 1976 by purchasing offsetting "short" futures contracts at an average price of $9.25 (A-34; 582 F. Supp. at 779). Strobl's speculation ended in a $460,000 loss (A-35; 582 F. Supp. at 779).

Strobl later claimed the decline in the futures market was caused, not by fundamental economics, but because of a manipulation of the futures contract market (A-23; 582 F.Supp. at 772). In response to specific interrogatories, the jury found defendants manipulated the commodities futures contract in violation of the CEA, and, by reason of this conduct alone, also had violated Section 1 of the Sherman Act. Its verdict awarded Strobl $460,000 in single damages (A-35; 582 F.Supp. at 779, A-54).

Because we believe the arbitrary nature of the jury verdict is not an issue which is appropriate for consideration by this Court, we limit this petition to the question of whether Strobl's single damages should be subject to trebling by application of the Sherman Act to conduct which Congress, when it amended the CEA in 1974, specifically determined should be subject only to single damages.

REASONS FOR GRANTING THE WRIT

This is the first time a court of appeals has ever condoned an award of antitrust treble damages based upon conduct specifically proscribed by comprehensive and specific regulatory legislation which limits recovery to single damages.

This decision by the Second Circuit is in direct conflict with a district court decision in the Seventh Circuit.[4] This Court should grant certiorari to resolve this incipient conflict regarding an important and significant issue. *See Shapiro v. United*

4 *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979).

States, 335 U.S. 1, 4, 78 (1948) (Certiorari granted to review conflict between the Second Circuit and a district court with respect to the interpretation of the Emergency Price Control Act).

The Second Circuit's decision also is in direct conflict with federal decisions which hold uniformly that antitrust treble damages may *not* be awarded for securities price manipulation on stock exchanges. Because trading of commodities futures contracts on commodities exchanges is a near replication of trading securities on securities exchanges, and is subject to a federal regulatory scheme which is modeled upon and therefore also replicates the federal securities regulatory scheme, the Second Circuit's decision creates a disparity in punishment and expectation of persons engaged in essentially identical investment activity.

The Second Circuit's decision also announces a new standard for judging the applicability of the antitrust laws to conduct which is the specific subject of prohibitions and regulations under the regime of a federal agency, here, the CFTC. Relying upon its analysis of this Court's decisions in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), the Second Circuit held that federal antitrust law was applicable in private actions involving federally regulated activity so long as application of the antitrust laws would not punish conduct "that a regulatory scheme might allow." (A-10; 768 F.2d at 27). If approved, this standard would apply, not only to private actions involving conduct subject to the regulatory jurisdiction of the CFTC, but to all private actions involving conduct subject to the regulatory jurisdiction of any federal regulatory agency, such as the SEC, the FCC, or the FPC.

We believe the Second Circuit was wrong in condoning the award of treble damages in this case, which did not involve that kind of anticompetitive activity to which the antitrust laws commonly are thought applicable. There was no claim or evidence that the price of any physical commodity was fixed or manipulated. The complaint had to do only with activity in connection with commodity futures contracts traded on a regulated commodities exchange (A-65).

Review by this Court should be seriously considered and, we believe, certiorari should be granted to determine the following questions, each of which implicates considerations which transcend this case.

1. Should treble damages be allowed where Congress has expressly stated that single damages is the appropriate remedy for the conduct in question? The Second Circuit now has said yes. A district court in the Seventh Circuit has said no on essentially identical facts, and federal courts uniformly have said no where the alleged manipulation was of securities on a securities exchange.

2. Was the Second Circuit correct in summarily rejecting the contrary reasoning of two decisions within the Seventh Circuit[5] on the specific issue of treble damage recovery where a statutory conflict on remedy exists, and on the appropriate approach to statutory construction and application in that context? A genuine disagreement exists between the two circuits which should be resolved.

3. Is it appropriate as a matter of policy to treat those who trade in commodity futures contracts on regulated commodities exchanges differently than those who trade securities on federally regulated stock exchanges? Again, the Second Circuit now has said yes. A district court in the Seventh Circuit has said no. In reaching that decision, that court relied in substantial part upon those analogous cases in which federal courts uniformly have held that a single damage remedy is the only available remedy for those who trade in securities.

4. Was the Second Circuit correct in its analysis of this Court's decisions in *Silver v. New York Stock Exchange, supra*, and *Gordon v. New York Stock Exchange, supra*, with its resulting pronouncement of a new standard controlling the applicability of federal antitrust laws to conduct which is specifically proscribed as part of a comprehensive regulatory scheme designed to police a particular industry?

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5 *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) and *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979).

POINT I

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION CONFLICTS WITH OBVIOUS CONGRESSIONAL INTENT

The Second Circuit failed to deal in substantive fashion with the import of Congress' explicit and repeated rejection of three bills providing for a treble damage remedy for conduct which violates the CEA. It concluded summarily and without basis that the defeat of these bills "says nothing about its [Congress'] view with respect to antitrust violations" and that "[t]he most that can safely be implied from the rejection of these bills is that it was not Congress's purpose either to expand or contract treble damage remedies." (A-12; 768 F.2d at 28). No justification exists for this conclusion, particularly when the comprehensive character of the CEA's remedial scheme, coupled with the CFTC's impressive array of enforcement tools, "strongly evidences an intent not to authorize additional remedies." *See Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 93-94 (1981). If anything, the defeat of the three bills proposing a treble damage remedy conclusively demonstrates that Congress meant to preclude treble damage recovery for conduct proscribed by specific provisions of the CEA.[6]

The CEA, as amended in 1974, constitutes "a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356 (1982). Numerous provisions pro-

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6 Ignoring the full Congress' rejection of a treble damage remedy, the Second Circuit relied essentially upon a single letter addressed to the Senate Agriculture and Forestry Committee by Representative Peter W. Rodino Jr. (A-13; 768 F.2d 28-29). Read in the context of the entire Congressional debate, Representative Rodino's letter is at best ambiguous and evidences no more than support for Congress' quite specific direction that the CFTC exercise its regulatory powers as consistently as possible with federal antitrust goals. *See* 7 U.S.C. § 19.

vide for penalties and reparations for CEA violations. *See, e.g.*, 7 U.S.C. §§ 13, 13-1, 13a-1, 13b, 18. Congress provided for a single damage remedy only.[7] This Court has provided for a private right of action on this basis. And the CEA does not provide for and has not been interpreted to include any additional remedies of any sort for a private litigant.

In these circumstances, this Court has not favored the imposition of remedies additional to those expressed or implied in a specific and comprehensive regulatory scheme. In *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO,* 451 U.S. 77, 95, 97 (1981), this Court held that an employer, found liable to its employees under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, had no federal common law right of contribution against the employees' union, even on the express assumption that elements of common contribution were satisfied. The touchstone of the decision was this Court's declaration: "The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Id.* at 97.

We do not claim *Northwest* necessarily is controlling in this case, because the creation of a federal claim for contribution obviously differs from a claim for treble damages under another federal statute, here, the Sherman Act. But, even if not dispositive, *Northwest* surely is relevant when application of the Sherman Act to the facts of this case introduces remedial inconsistencies, which include not only triple recovery but the recovery of attorneys' fees, and introduces a different statute of limitations as well. We believe the Second Circuit's decision is at odds with the reasoning of *Northwest*, and should be reviewed by this Court for this reason also.

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7 *Compare* H.R. 11195, 93d Cong., 1st Sess. Section 17(3) (1973); S.2837, 93d Cong., 1st Sess. Section 505 (1973), p. 119; and S.2578, 93d Cong., 1st Sess. Section 20(3) (1973), pp. 76-77, with Pub.L.No. 93-463, 88 Stat. 1389, *codified at* 7 U.S.C. § 1 *et seq.*

POINT II

CERTIORARI SHOULD BE GRANTED BECAUSE A CONFLICT EXISTS BETWEEN THE SECOND AND SEVENTH CIRCUITS BOTH ON THE SPECIFIC ISSUE OF TREBLE DAMAGE RECOVERY AND ON THE APPROPRIATE APPROACH TO STATUTORY CONSTRUCTION AND APPLICATION

In *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979), as the Second Circuit acknowledged, the district court "faced a situation in all important respects identical to the one here." (A-14; 768 F.2d at 14). Plaintiffs claimed certain soybean traders and brokers had jointly manipulated the price of soybean futures by executing "orders without trading in the pits by open outcry, a practice known in the trade as 'bucketing'." 468 F.Supp. at 107. Plaintiffs sought to recover under both the CEA and the Sherman Act.

The court in *Smith* acknowledges that the drafters of the 1974 Amendments to the CEA intended to preserve the applicability of the antitrust law with respect to conduct which was *not* proscribed by the CEA, *see Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), but found the real question was whether plaintiffs might simultaneously pursue both single and treble damages for conduct which was proscribed by the CEA. *Smith v. Groover*, 468 F.Supp. 105, 116-17 (N.D. Ill. 1979).[8] The *Smith* court answered in the negative. "The spe-

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8 The court of appeals purports to attack the holding in *Smith* on the ground that the authorization of alternative pleading by Rules 8(a)(3) and 8(e)(2) of the Rules of Federal Practice provide that inconsistent causes of action may be stated alternatively and hypothetically and therefore Strobl was not required to make an election of remedies. The reliance upon those rules is misplaced. Limiting recovery for an alleged CEA violation to the single damage remedy contained in that Act would not revive the ancient practice of requiring an election between two inconsistent remedies (a practice which Rules 8(a)(3) and 8(e)(2) were designed to overcome), but rather would recognize that no treble damage remedy, under any rubric, exists for activity specifically covered by the CEA.

cific statutory prohibitions contained in the CEA . . . must prevail over the general prohibitions of the Sherman Act." 468 F.Supp at 116. Its holding turned in part upon the marked inconsistency between the single damage remedy provided in the CEA and the treble damage remedy provided in the Sherman Act:

> Under the CEA, plaintiffs may recover only single damages; the Sherman Act provides for recovery of treble damages . . . Given [this] apparent inconsistenc[y], plaintiffs must pursue their more specialized remedy.

468 F.Supp. at 116.

The court in *Smith* quite logically concluded that Congressional rejection of three bills providing for treble damages for CEA violations "demonstrates . . . a congressional decision not to expand recovery under the existing private right." 468 F.Supp. at 113.[9]

In reaching its decision, the court in *Smith* also relied heavily upon the Seventh Circuit's determination of the identical issue in a case involving the closely analogous offense of securities manipulation. *Schaefer v. First National Bank of Lincolnwood*, 326 F.Supp. 1186 (N.D. Ill. 1970), *aff'd in part and rev'd in part*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). Plaintiffs in *Schaefer* brought an action based upon common law fraud, the Sherman Act, the Clayton Act, the Securities Act of 1933 and the Securities Exchange Act of 1934. The antitrust claims were made in connection with an alleged manipulation of the market price of a publicly traded

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9 Similarly, in *Navigator Group Funds v. Shearson Hayden Stone, Inc.*, 487 F.Supp. 416 (S.D.N.Y. 1980), the court, in upholding a private right of action under the CEA rejected the argument that the repeated Congressional refusal to sanction treble damages for CEA violations reflected an intent that no private right of action should exist at all. The court construed the Congressional rejection of a treble damage remedy as evidencing, in the exact language of *Smith*, "nothing more than a congressional decision not to expand recovery under the existing private right." 487 F.Supp. at 423.

security and were predicated upon the theory that "the conspiracy to create and maintain an artificial trading price for . . . stock . . . was price fixing . . . [within the literal language] of the Sherman Act." *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287, 1299 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

In concluding that the antitrust claims were not permissible in these circumstances, the Seventh Circuit expressly adopted the reasoning of the district court in *Schaefer* (509 F.2d at 1300) which dismissed the antitrust claims because: (i) the Securities Exchange Act's specific prohibition against securities price manipulation preempted the more generalized Sherman Act claim with respect to conduct which was arguably actionable under both statutes (326 F.Supp. at 1190-91); (ii) the alleged market manipulation scheme constituted fraud and not a restraint of trade as contemplated by the Sherman Act (326 F.Supp. at 1191-92); and (iii) inconsistencies between the Sherman Act and the Securities Exchange Act with respect to statutes of limitation, provisions for attorneys' fees and *recoverable damages* conclusively established that Congress could not have intended securities fraud claims to be tried as a matter of restraint of trade. (*Id.* at 1192). Indeed, the district court in *Schaefer*, with the subsequent approval of the Seventh Circuit (509 F.2d 1300), found this inconsistency of remedies sufficient in itself to require dismissal of the antitrust claims.

> Certainly Congress could not have intended that the damage restrictions contained in the carefully drawn prohibitions against market manipulation in the 1934 Act could be evaded and effectively nullified by the simple expedient of invoking the Sherman Act. (326 F.Supp. at 1192).

The Second Circuit rejected these relevant and reasoned decisions with the back of its judicial hand. It first noted "that, unlike the securities and antitrust laws, the commodities and antitrust laws have long co-existed." (A-16; 768 F.2d at 30). It next characterized the district court's opinion in the *Smith* case

as "untenable." (A-16; 768 F.2d at 30). The decision in *Smith* cannot be characterized as "untenable" and the Second Circuit is wrong in its statement that "unlike the securities and antitrust laws, the commodities and antitrust laws have long co-existed."

Because the Second Circuit offers no support for this last conclusion, it apparently was relying upon four cases cited earlier in its opinion (A-12; 768 F.2d at 28): *Chicago Board of Trade v. Olsen*, 262 U.S. 1 (1923); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *United States v. Patten*, 226 U.S. 525 (1913); *Miller v. New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977). If this is the case, however, the Second Circuit's reliance is misplaced.

Not one of these four cases had to do with purported manipulation of the price of futures contracts on a commodities exchange. *Chicago Board of Trade v. Olsen* held only that futures markets affect interstate commerce as a part of its rejection of a challenge to constitutionality of the Grain Futures Act. *Chicago Board of Trade v. United States* decided whether certain CBOT rules comported with strictures of the Sherman Act. *Patten* was concerned only with the applicability of federal antitrust laws to a corner of the physical supply of cotton. The question in *Patten* was "whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton. . . is within the terms of § 1 of the Anti-trust Act." *Id.* at 540-41. The *Miller* case never considered, much less determined, whether an antitrust claim might be brought based upon concerted action in violation of various provisions of the CEA.

The Second Circuit also rejected the rational and federally consistent manner in which the Seventh Circuit in *Schaefer*, and the district court in *Smith*, approached the difficult problems of statutory construction and application which are inherent whenever two statutes, one specific and one general, may be said to prohibit identical conduct.

It is a fundamental canon of statutory construction that "[s]pecific terms prevail over the general in the same or

another statute which might otherwise be controlling." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957), *quoting with approval, Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (citation omitted).

Consistent with this fundamental principle, both *Smith* and *Schaefer* followed those numerous federal courts which, when faced with a specific statutory single damage claim and a treble damage antitrust claim based upon the same conduct, held the only permissible claim was for the specific single damage remedy. *See, e.g., Terminal Warehouse Co. v. Penn. R. Co.*, 297 U.S. 500 (1936) (Cardozo, J.) (Plaintiff had no antitrust action against either a competitor or a railroad which granted rate preferences to the competitor, but was limited to the specific remedy provided under the Interstate Commerce Act); *Bucher v. Shumway*, 452 F.Supp. 1288 (S.D.N.Y. 1978) (Fixing the price of a particular securities purchase was not cognizable under the antitrust laws); and *In re Transocean Tender Offer Securities Litigation*, 427 F.Supp. 1208 (N.D. Ill. 1977) (Plaintiffs' claims for alleged market manipulation or coercion must be pursued under the securities laws; their antitrust claims were superfluous at best).

Again, the Second Circuit disagreed summarily. It simply stated: "we do not believe that the specific remedy rule—a rule of statutory construction—should be applied in this case." (A-16; 768 F.2d at 30). No substantive explanation was provided.

This Court should grant certiorari to resolve the incipient conflict between the Second Circuit's decision and *Smith v. Groover, supra*. The Second Circuit's decision provided no cogent reason to disregard the holding and reasoning of *Smith v. Groover, supra*, and of a closely related case, *Schaefer v. First National Bank of Lincolnwood, supra*. Moreover, this Court should grant certiorari because the Second Circuit expressly rejected a fundamental rule of statutory construction, namely the specific remedy rule, which has been repeatedly enunciated by this Court. *See supra* at p. 14.

POINT III

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION INTRODUCES DISPARITY IN THE APPLICATION OF FEDERAL LAWS TO ESSENTIALLY IDENTICAL INVESTMENT ACTIVITY

The Second Circuit's decision raises the basic question of whether investors in commodities futures contracts ought to be subject to different standards than investors in common stock.[10] The Second Circuit has now said yes. That determination merits review by this Court.

There is no reason why the federal antitrust laws should apply in one case while not in the other. This is particularly true in view of: (i) Congress' admonition that it did not want to make the antitrust laws more restrictive in the commodities industry than in the securities industry, *see* S. Rep. No. 93-1131, 93d Cong., 2d Sess. at 23 (Aug. 29, 1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5843, 5863, and (ii) the impropriety of imposing inconsistent remedial standards upon inherently similar industries. *See Leist v. Simplot*, 638 F.2d 283, 298 n.14 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982) ("While there are differences between the commodities and securities fields, what is relevant to the present question is the common legislative objective of insuring fair dealing for investors on what are important public markets, and the common legislative approach to attaining this objective. The analogy between the two fields has been repeatedly recognized by Congress . . . by the courts . . . by the CFTC . . . and by the commentators . . . ").

---

10 Federal courts have uniformly rejected treble damage recovery for manipulation of common stock. *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 576 F.Supp. 922, 928 (D. Del. 1983); *Bucher v. Shumway*, 452 F.Supp. 1288, 1290 (S.D.N.Y. 1978).

POINT IV

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT HAS ANNOUNCED A STANDARD FOR TREBLE DAMAGE RECOVERY IN A FEDERALLY REGULATED AREA WHICH HAS CONSEQUENCES REACHING FAR BEYOND THIS CASE

The Second Circuit's decision established a standard for determining the applicability of the antitrust laws to conduct subject to the plenary regulatory jurisdiction of the CFTC. The Second Circuit, relying upon its interpretation of two decisions of this Court, *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), held that private treble damage actions must be allowed unless such actions seek to punish conduct "that a regulatory scheme might allow." (A-10; 768 F.2d at 27).

The standard enunciated by the Second Circuit has far-reaching consequences. In the instant case, application of the standard creates stark conflicts and inconsistencies regarding the amount of recoverable damages, the award of attorneys' fees, and the applicable statute of limitations. *See supra* at pp. 11, 12. More importantly, the standard articulated by the Second Circuit cannot be confined to cases involving the interaction between the antitrust laws and the CEA but extends to any case where a federal regulatory agency has jurisdiction over conduct which may give rise to an antitrust violation. Petitioners do not know, nor could they know, all the conceivable and potentially ominous consequences which would ensue. This Court, not a lower court interpreting precedents of this Court, should be the final arbiter of the meaning of *Silver v. New York Stock Exchange, supra*, and *Gordon v. New York Stock Exchange, supra*, and should be the Court to formulate standards with such far-reaching consequences.

CONCLUSION

Certiorari should be granted.

Dated: New York, New York
October 2, 1985

Respectfully submitted,

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85-571

Supreme Court, U.S.
FILED
OCT 2 1985
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Petitioners,

v.

JOSEPH STROBL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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October 2, 1985

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 648, 781—August Term, 1984

(Argued February 13, 1985, Decided July 5, 1985)

Docket Nos. 84-7328, 84-7770

JOSEPH STROBL,

Plaintiff-Appellee Cross-Appellant,

v.

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON AND MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., BEN PRESSNER, PRESSNER TRADING CORP., JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT, a/k/a J.R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., SIMPLOT PRODUCTS COMPANY, INC., PETER J. TAGARES a/k/a PETER J. TAGGARES, P.J. TAGGARES COMPANY, C.L. OTTER, SIMTAG FARMS, KENNETH RAMM, A & B FARMS, INC., HUGH D. GLENN, GEARHEART FARMING, INC., ED MCKAY, HARVEY POLLAK, HENRY POLLAK, HENRY POLLAK, INC., HENRY A. POLLAK & COMPANY, INC., ROBERT REARDON, a/k/a BOBBY REARDON, F.J. REARDON, INC., ALEX SINCLAIR, SINCLAIR & COMPANY, STEPHEN SUNDHEIMER, CHARLES EDELSTEIN, JAMES LANDRY a/k/a JIM LANDRY and JERRY RAFFERTY,

jointly and severally,

Defendants,

JOHN R. SIMPLOT, J.R. SIMPLOT CO., SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIM-TAG FARMS,

Defendants-Appellants Cross-Appellees.

Before:

FEINBERG, Chief Judge
TIMBERS and CARDAMONE, Circuit Judges

Defendants J.R. Simplot, P.J. Taggares, SimTag Farms, et al., appeal from a judgment that awarded damages under the antitrust laws following a jury verdict in the United States District Court for the Southern District of New York (MacMahon, J.) in favor of plaintiff Strobl. Plaintiff claimed he had suffered losses because of defendants' manipulation of the 1976 Maine potato commodities futures market. Defendants argue that this conduct, which is specifically prohibited by the Commodity Exchange Act, cannot be asserted as an antitrust claim.

Affirmed.

PETER FLEMING, Jr., New York, New York (Scott J. McKay Wolas, Peter K. Vigeland, Michael T. Zimmerman, Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel), *for Defendants-Appellants/Cross-Appellees.*

CHRISTOPHER LOVELL, New York, New York (Victor E. Stewart, George F. Brammer, Jr., Lovell & Stewart, New York, New York, of counsel), *for Plaintiff-Appellee/Cross-Appellant.*

CARDAMONE, *Circuit Judge*

This appeal represents the latest chapter in a long history of litigation generated by the highly publicized May 1976 default of Maine potato futures contracts that occurred when the sellers of 1000 contracts failed to deliver approximately 50 million pounds of potatoes. The sellers' refusal to deliver brought about the largest default in the history of commodities futures trading. Throughout an 11-day trial before the United States District Court for the Southern District of New York (MacMahon, J.), plaintiff Joseph Strobl contended that defendants J.R. Simplot, P.J. Taggares and their potato processing companies acting in concert as sellers brought about this default. Strobl claimed that these defendants engaged in a conspiracy to drive down potato prices and default on Maine potato futures contracts and that they profited by reducing the prices they paid for potatoes in 1976 and thereafter. Strobl had invested in 1976 Maine potato futures; the damages he claimed were the difference between what he received from the sale of those futures and what he would have received in a fair market.

In his complaint Strobl asserted both a private right of action for damages under § 9 of the Commodity Exchange Act as amended, 7 U.S.C. § 13, and antitrust claims under §§ 1-3 of the Sherman Act, 15 U.S.C. §§ 1-3, and § 2 of the Clayton Act, 15 U.S.C. § 13. The jury found for Strobl both on his private right of action under the Commodity Exchange Act and on his antitrust claims under the Sherman and Clayton Acts. The district court awarded him treble damages amounting to $1,386,000 on the antitrust claims and, in the alternative, single damages of $460,000 on the Commodity Exchange Act claim.

On appeal, defendants attack the sufficiency of the evidence to show a conspiracy prior to the time when Strobl liquidated his commodities futures position, and also the sufficiency of evidence to show, prior to that time, the existence of an artificial futures price. Defendants further claim that the damage award was irrational and should be reduced. They also

contend that the district court committed reversible error when it refused to admit into evidence a decision in an administrative proceeding that arose from these same facts, and when it failed to order a new trial after the same administrative law judge rendered a second decision. Strobl cross-appeals from the district court's order that denied him prejudgment interest on the Sherman Act damages.

We reject defendants' arguments substantially for the reasons stated in Judge MacMahon's thorough opinions on defendants' motions for a judgment N.O.V. and for a new trial. Both of these opinions, published in separate volumes of the Federal Supplement, are entitled *Strobl v. New York Mercantile Exchange*, 582 F. Supp. 770 (S.D.N.Y. 1984) and 590 F. Supp. 875 (S.D.N.Y. 1984). Moreover, we agree with the reasons given by the district court when it denied plaintiff prejudgment interest on the Sherman Act damages, 590 F. Supp. at 882-83.

Thus, the only issue necessary to address is defendants' argument that antitrust causes of action are not properly raised by plaintiff because conduct specifically prohibited by the Commodity Exchange Act cannot be the basis for a treble damage award under the antitrust laws. To date no other circuit court has decided this specific issue. Because we find defendants' contention unpersuasive, we affirm the judgment appealed from.

I FACTS

The complex factual background and procedural history of this case is described thoroughly in the following decisions: *National Super Spuds, Inc. v. New York Mercantile Exchange*, 470 F. Supp. 1256 (S.D.N.Y. 1979), *rev'd sub nom. Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982). These cases also provide a detailed background of the structure and regulation of the commodities futures trading market. We summarize here only the factual background needed to understand this appeal.

This case involves commodities futures contracts for Maine potatoes. A commodities futures contract is an executory contract for the sale of a commodity executed at a specific point in time with delivery of the commodity postponed to a future date. Every commodities futures contract has a seller and a buyer. The seller, called a "short," agrees for a price, fixed at the time of contract, to deliver a specified quantity and grade of an identified commodity at a date set in the future. The buyer, or "long," agrees to accept delivery at that future date at the price fixed in the contract. It is the rare case when buyers and sellers settle their obligations under futures contracts by actually delivering the commodity. Rather, they routinely take a short or long position in order to speculate on the future price of the commodity. Then, sometime before delivery is due, they offset or liquidate their positions by entering the market again and purchasing an equal number of opposite contracts, *i.e.*, a short buys long, a long buys short. In this way their obligations under the original and liquidating contracts offset each other. The difference in price between the original contract and the offsetting contract determines the amount of money made or lost.

In September and October of 1975 plaintiff invested in the long or buying side of May 1976 Maine potato futures contracts, that is he agreed to buy potatoes at an agreed price on a future date. Strobl's average cost was approximately $18.30 per hundredweight (cwt). By May 4, 1976 Strobl had liquidated all of his long contracts at an average price of between $9.12 and $9.76 per cwt. According to proof at trial, the defendants Simplot and Taggares, two of the largest competitors in the purchase and processing of potatoes, conspired to manipulate the futures prices in Maine potatoes. Maine potato futures prices were unusually high in 1976. This was because of record demand for and low supply of Maine potatoes. This high futures price tended to drive up cash potato prices. Yet, due to their need to purchase large quantities of potatoes, the defendants had an interest in lower potato prices. By its verdict the jury found that these defendants conspired to reduce the price

of the 1976 Maine potatoes futures contracts. Defendants accomplished this by purchasing vast amounts of the "short" side of futures contracts and becoming obligated to deliver millions of pounds of Maine potatoes that they did not have. By purchasing so heavily on the short side, the conspirators artificially inflated the perceived supply of Maine potatoes, thereby driving down both the futures prices and cash prices. Defendants did not attempt to obtain the potatoes that they were obligated to deliver. Nor did they offset, which they could have done by purchasing long positions in an amount sufficient to equalize their extensive short position. Instead, defendants simply defaulted on their delivery obligations. With so many selling positions not offset by buying positions, there was a surplus of sellers, which effectively caused the price of Maine potato commodities contracts to plummet. By May 4, 1976 Strobl had sold his long futures on Maine potatoes at a significant loss. The jury found that this conspiracy existed before May 4 and that it depressed the futures price on May 1976 Maine potatoes prior to that date.

II COMMODITY EXCHANGE ACT

A. *Background*

To answer defendants' claim that the treble damage award cannot stand, we begin with an explanation of the Commodity Exchange Act. The history of commodities regulation and the Act has been exhaustively discussed by this Court in an earlier opinion on another aspect of this case, *Leist v. Simplot*, 638 F.2d at 293-96, and in the Supreme Court's affirmance, *Merrill Lynch Pierce, Fenner & Smith v. Curran*, 456 U.S. at 357-67. Thus, it is outlined only briefly here. The first federal regulation of commodities futures trading came in 1921 with enactment of the Futures Trading Act, 42 Stat. 187 (1921). When that Act was declared an unconstitutional exercise of the taxing power, *Hill v. Wallace*, 259 U.S. 44 (1922), it was redrafted and enacted as the Grain Futures Act, 42 Stat. 998 (1922). These early Acts established the pattern of commodity futures regula-

tion: federal supervision of trading that takes place on central exchanges; enforcement provided by the Secretary of Agriculture; fines and imprisonment established for violations, which included price manipulation. The provision that prohibits manipulation of prices has remained virtually unchanged, and it is that provision that the defendants have been found to have violated.

The Commodity Exchange Act, 49 Stat. 1491 (1936), extended the coverage of the earlier Acts, but did not alter the method of regulation. The 1968 amendments, 82 Stat. 26 (1968), further extended the Act's coverage and strengthened its penalties. The Act was amended again in 1974 by the Commodity Futures Trading Commission Act of 1974, 88 Stat. 1389 (1974).

> In contrast to the limited scope of the 1968 amendments, the 1974 amendments, 88 Stat. 1389 (1974), constituted a complete overhaul of the Act. They broadened its coverage from the agricultural commodities with which it had historically been concerned to include "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in", subject to certain exceptions designed primarily to exclude securities. Consistently with this expansion in coverage, enforcement was transferred from the Department of Agriculture to a newly constituted Commodity Futures Trading Commission (CFTC).

Leist v. Simplot, 638 F.2d at 295. Although the 1974 amendments gave the Commodity Futures Trading Commission (Commission or CFTC) greater enforcement powers than its predecessor, the provisions describing prohibited activity, specifically price manipulation, remained essentially unchanged.[1]

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1 The Commodity Exchange Act was further amended by the Futures Trading Act of 1978, 92 Stat. 865 (1978), and the Futures Trading Act of 1982, 96 Stat. 2294 (1983). These amendments are not relevant to this appeal because the activities at issue all occurred prior to their enactment.

In *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, the Supreme Court affirmed our holding in *Leist v. Simplot* that plaintiffs have a private right of action under the Commodity Exchange Act, as amended in 1974. The *Merrill Lynch* Court characterized the Act as " 'a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.' " 456 U.S. at 356 (quoting H.R. Rep. No. 975, 93d Cong., 2d Sess. 1 (1974)). Plaintiffs had a private right of action for damages under that statute, the Supreme Court reasoned, because such actions had been permitted in the past, and because when Congress amended the statute it left intact those provisions under which lower federal courts had found an implied right of action. This constituted evidence that Congress wanted to preserve that remedy. 456 U.S. at 374-82. In addition, the legislative history of the amendments revealed Congress's aim to preserve the remedy. *Id.* at 382-88.

B. *Implied Repeal of the Antitrust Laws*

Defendants argue that antitrust laws no longer apply to activity that violates the Commodity Exchange Act. To support that proposition they point first to Supreme Court cases that have discussed or found implied repeal of the antitrust laws by the securities laws. To the contrary, we conclude that those cases indicate that Congress aimed to have activities such as those engaged in by the defendants in this case covered by the antitrust laws.

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Supreme Court considered the relationship of the antitrust laws and the Securities Exchange Act of 1934. The stock exchange had ordered some of its members to remove private direct telephone connections those members had with the offices of nonmembers located in the State of Texas. Specifically at issue was whether such action, which would be a per se violation of § 1 of the Sherman Act, was immune from a lawsuit based on the antitrust laws because of the self-regulation features of the securities laws. The Court announced a "guiding principle" for reconciliation of the antitrust laws with

a regulatory scheme adopted in a statute. According to the Court, "[r]epeal is to be regarded as implied, only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357. Because the Securities Exchange Commission, the regulatory agency involved, had no power to supervise the application of the SEC Rules under attack, *Silver* held that permitting suit under the antitrust laws did not disturb the regulatory scheme. The Court added that "[s]hould review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." *Id.* at 360. Moreover, in a footnote it stated:

> Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today.

Id. at 358 n.12.

The issue that the Supreme Court left open in *Silver* was resolved in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975). In that case plaintiffs sued the New York Stock Exchange claiming that the system of fixed commission rates used by the Exchange violated §§ 1 and 2 of the Sherman Act. Section 19(b)(9) of the Securities Exchange Act gave the SEC authority to approve or disapprove exchange commission rates. Inasmuch as the SEC had such authority—and because it used that authority—the Supreme Court held that the system of fixed commission rates was beyond the reach of the antitrust laws. *See* 422 U.S. at 691-92 (Douglas, J., concurring).

The Court reasoned, first, that the SEC's exercise of its authority over the rates, and Congress's continued approval of that authority, demonstrated Congress's desire that the fixing of rates be left to the SEC. Further, it determined that implied repeal of the antitrust laws was necessary for the Securities Exchange Act to function effectively. The reason is plain. In setting commission rates, the SEC is concerned not only with protecting competition—as are the antitrust laws—but also

with "the economic health of the investors, the exchanges, and the securities industry." *Id.* at 689 (footnote omitted). Without antitrust immunity the exchanges would be subject to varying standards or requirements issued by diverse federal courts and thereby be unable to function in a consistent manner, without violating either the mandate of an antitrust judicial decision or the Rules of the SEC. *Id.*

Defendants claim that *Silver* and *Gordon* can be read to say that when a commodities exchange activity is subject to the jurisdiction of some regulatory body, it is exempt from the antitrust laws. This over-simplified reading does not survive closer analysis. Both *Silver* and *Gordon* discussed potential *conflicts* between the antitrust laws and a regulatory scheme. *See United States v. Philadelphia National Bank*, 374 U.S. 321, 352 (1963) (consolidation of banks under the Bank Merger Act was enjoined under the Clayton Act as there was no conflict between the two Acts). Their holdings teach that antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme might allow. Both cases reassert that "[r]epeal of the antitrust laws by implication is not favored and not casually to be allowed," and is to be implied "[o]nly where there is a 'plain repugnancy between the antitrust and regulatory provisions.' " *Gordon*, 422 U.S. at 682 (quoting *Philadelphia National Bank*, 374 U.S. at 350-51). The "plain repugnancy" found in *Gordon* was the potential for *conflicting* standards and the fact that application of antitrust laws would render § 19(b)(9) of the Securities Exchange Act nugatory. *Gordon*, 422 U.S. at 689. Thus, repeal of antitrust jurisdiction cannot be implied simply when the antitrust laws and a regulatory scheme overlap.

In the instant case, the Commodity Exchange Act clearly governs the activities at issue.[2] Price manipulation—the activity in which defendants were found to have engaged—is specifically forbidden. Section 6(b) of the Act, 7 U.S.C. § 9,

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2 Unless stated otherwise, all citations to the Commodity Exchange Act refer to provisions enacted prior to the 1978 and 1983 amendments. *See* note 1 *supra*.

prohibits market manipulations and corners. Section 5(d), 7 U.S.C. § 7(d), makes it a condition of contract market designation for an exchange to provide for the prevention of those abuses. Section 8a(9), 7 U.S.C. § 12a(9), authorizes the Commission to declare an emergency and order appropriate steps if there are "threatened or actual manipulations or corners." Section 9(b), 7 U.S.C. § 13(b), makes it a felony to commit the offenses of price manipulation or cornering. The Commission is also empowered to take steps to reduce the risk that these offenses will be committed. *See* 7 U.S.C. § 13a-1 (CFTC may seek an injunction against person who is "restraining trading"); § 12a(7) (CFTC may "alter or supplement the rules of a contract market" to protect "persons producing, handling, processing, or consuming any commodity traded for future delivery . . ., or the product or byproduct thereof, or for the protection of traders or to insure fair dealing in commodities traded for future delivery"); and § 7a(10) (CFTC may direct that revisions be made in futures contracts with respect to delivery locations and price differentials "as will tend to prevent or diminish price manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce"). In fact, the Commodity Exchange Act is "bristling with anti-manipulation provisions." *See* I M. Johnson, *Commodities Regulation* § 1.86, at 193 (1982). As price manipulation also violates antitrust laws, none of these provisions conflicts with the purposes and standards of the antitrust laws. There is no built-in balance in the regulatory scheme of the Act that permits a little price manipulation in order to further some other statutory goal. Quite the opposite, price manipulation is an evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws. Therefore, application of the latter cannot be said to be repugnant to the purposes of the former.

C. *Legislative History*

Defendants next claim that the legislative history of the 1974 amendments demonstrates a congressional purpose to elimi-

nate antitrust causes of action for Commodity Exchange Act violations. The defendants' argument focuses primarily on Congress's rejection, prior to passing the 1974 amendments, of three bills that would have provided for treble damages for Commodity Exchange Act violations. Defendants contend that this "unequivocally demonstrates" that Congress did not intend to provide an antitrust treble damage remedy for conduct violative of the Act. This leap of logic falls short of being persuasive. The fact that Congress considered and rejected a treble damage remedy for Act violations says nothing about its view with respect to antitrust violations. Congress might well have decided that treble damages under the antitrust laws were sufficient and that there was no need, therefore, to add such a remedy to the Commodity Exchange Act. The most that can safely be implied from the rejection of these bills is that it was not Congress's purpose either to expand or contract treble damage remedies.

Contrary to defendants' view, the legislative history of the 1974 amendments reveals that Congress desired the continued application of the antitrust laws to those anticompetitive practices that also violate the Commodity Exchange Act. There is no doubt that such laws have traditionally been applied to the commodities industry. *See, e.g., Chicago Board of Trade v. Olsen*, 262 U.S. 1, 39-40 (1923); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238-41 (1918); *United States v. Patten*, 226 U.S. 525, 541-43 (1913); *Miller v. New York Produce Exchange*, 550 F.2d 762, 766-68 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977). During the process of enactment of the 1974 amendments, the House Agriculture Committee unanimously struck from the original draft an exemption from coverage under the antitrust laws for commodities futures transactions. *See Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 259 (1974) (Senate Hearings).

Further, there was ample testimony during the debate over the proposed amendments that supports plaintiff's position that Congress wanted to continue antitrust jurisdiction. Chair-

man Rodino of the House Judiciary Committee testified at length on this subject stating:

> The nature of commodity futures markets demonstrates the peculiar intimacy and special relationship these markets have with the fundamental national legal, economic, and social policies expressed in our antitrust laws since enactment of the Sherman Act in 1890 . . . .
>
> . . . .
>
> . . . . By insuring the applicability of the antitrust laws to the commodity futures industry, the purpose of these laws, "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress," *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958), will be promoted as well as protected.

Senate Hearings, *supra*, at 257-58. It was feared that a proviso in the draft bill that conferred "exclusive jurisdiction" on the Commission would be read as an attempt to preempt even federal courts from jurisdiction over commodities trading. Congressman Rodino commented:

> That such a result was not intended in the House is readily apparent from the House action striking the original antitrust exempting provision; antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws.

Id. at 259. The House leadership urged the Senate to amend the bill to read: "And provided further, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities and on federal court." *Id.* at 260. The bill as finally passed by both Houses contained substantially the language suggested. *See* § 2(a)(1) of the Commodity Exchange Act, 7 U.S.C. § 2.

Plainly, Congress had the issue of the applicability of the antitrust laws to commodities trading squarely before it. It was aware that the antitrust laws had historically been applied in that context and expressly rejected attempts to change that scheme. Significantly, Congress adopted language that had been proposed to insure that the antitrust laws would remain applicable to commodities trading and preserved the jurisdiction of the federal courts in the commodities field. All of this points inescapably to the conclusion that it was part of Congress's fixed purpose to have the antitrust laws apply in a case such as the instant one. We therefore hold that enactment of the Commodity Exchange Act did not effect a repeal of the antitrust laws.

III STATUTORY CONSTRUCTION

A. *The Specific Remedy Rule*

Even if there is no Congressional repeal of the antitrust laws with respect to activity that also violates the Commodity Exchange Act, defendants assert that an antitrust cause of action cannot be maintained in this case because it is a "cornerstone of statutory construction" that specific terms prevail over general ones in the same or another statute that might otherwise be controlling. The argument assumes that inasmuch as the Commodity Exchange Act specifically rules out price manipulation in the commodities market, a private right of action under that statute must be pursued instead of an action under the more general interdiction of the antitrust laws. For this "specific remedy rule," defendants rely on two Illinois district court cases. *Smith v. Groover*, 468 F. Supp. 105 (N.D. Ill. 1979), and *Schaefer v. First National Bank of Lincolnwood*, 326 F. Supp. 1186 (N.D. Ill. 1970), *aff'd in part and rev'd in part*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

The district court in *Smith v. Groover* faced a situation in all important respects identical to the one here. Plaintiffs alleged that defendants "bucketed" orders for soybean futures in

violation of the Chicago Board of Trade and CFTC regulations. Bucketing is "[d]irectly or indirectly taking the opposite side of a customer's order into the handling brokers [sic] own account or into an account in which he has an interest, without bona fide speculation on an Exchange." S. Rep. No. 1131, 93d Cong., 2d Sess. app. IX, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5843, 5891. Plaintiffs also claimed that the bucketing activity violated the Sherman Act. The *Smith* court found that because "plaintiffs ha[d] a private right of action under the [Commodity Exchange Act], their antitrust claims . . . [were] 'superfluous.' The specific statutory prohibitions contained in the [Commodity Exchange Act], as amended, must prevail over the general prohibitions of the Sherman Act." 468 F. Supp. at 116. The court further observed that only single damages are recoverable under the Commodity Exchange Act, while the Sherman Act permits treble damages, and concluded therefore that plaintiffs must pursue the more specific remedy. *Id.* The issue was not, according to the *Smith* court, one of implied repeal of the antitrust laws. It was merely "whether plaintiffs may pursue different remedies, one which is aimed at the precise conduct alleged to have been committed by defendants, and the other which is aimed at a universe of conduct, of which defendants' alleged acts constitute just a small set." *Id.* at 116-17.

In reaching its conclusions the court adopted the analysis in *Schaefer v. First National Bank of Lincolnwood.* In *Schaefer* stock purchasers sought to recover damages for defendants' alleged conspiracy to manipulate the market for their stock. The court found, first, that the specific remedies in the securities acts controlled over the more general prohibitions of the antitrust laws. 326 F. Supp. at 1190-91. The court explained that clauses in the 1933 and 1934 Securities Acts that preserved "rights and remedies that may exist at law or in equity" did not change its analysis. Stock market manipulation schemes had not been considered "restraint of trade" at common law, and had thus not come under the coverage of the Sherman Act. *Id* at 1191-92. Finally, the court noted that there would be a

number of inconsistencies were plaintiffs to be permitted to pursue both their Sherman Act and Securities Acts causes of action. These included differences in damage remedies, statutes of limitations, and provisions for attorney's fees. It concluded that to allow pursuit of both remedies would encourage investors to bring suit under the Sherman Act, a result that it said "Congress could not have intended." *Id.* at 1192.

B. *Application of the Specific Remedy Rule to This Case*

We expressly refuse to adopt the rationale of *Smith* or *Schaefer.* We first note that, unlike the securities and antitrust laws, the commodities and antitrust laws have long co-existed. This distinction aside, we do not believe that the specific remedy rule—a rule of statutory construction—should be applied in this case. *See Strax v. Commodity Exchange, Inc.*, 524 F. Supp. 936, 940 (S.D.N.Y. 1981); *Pollock v. Citrus Associates*, 512 F. Supp. 711, 715-17 (S.D.N.Y. 1981).

The *Smith* court's distinction between its analysis and an implied repeal of the antitrust laws is untenable. If the *Smith* court intended by its holding that a plaintiff can never pursue an antitrust remedy for anticompetitive activity that also violates the Commodity Exchange Act, then it ruled, in effect, that antitrust laws do not apply to that kind of activity. Further, if to reach that result the court relied on the specific remedy rule it was then stating that in this context Congress aimed to repeal the antitrust laws. For reasons previously discussed, we reject this view. Alternatively, if defendants rely on *Smith* to argue that plaintiff may not *plead* both a specific Commodity Exchange Act cause of action and a general cause of action under the antitrust laws they are plainly mistaken. To accept that proposition would be repugnant to the Federal Rules of Practice, which provide that inconsistent causes of action may be stated alternatively or hypothetically. Fed. R. Civ. P. 8(a)(3) and 8(e)(2). *Pollock v. Citrus Associates*, 512 F. Supp. at 716.

In sum, although the "specific over general" principle is an accepted rule of statutory interpretation, *see, e.g., Radzanower*

v. Touche Ross & Co., 426 U.S. 148, 153 (1976), it is not to be followed blindly. Statutes are to be construed together to effectuate, to the greatest extent possible, the legislative policies of both. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). A proper statement of the specific remedy rule is that absent clear evidence of contrary intent, a specific statute is not controlled by a general one. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Here, as noted earlier, the history of the Commodity Exchange Act, and of the enactment of the 1974 amendments to that act, provide compelling evidence of contrary intent.

IV CONCLUSION

Accordingly, we hold that the district court correctly allowed plaintiff to pursue an antitrust cause of action in this case. The judgment awarding plaintiff treble damages is affirmed.

July 5, 1985

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 84-7328, 7770

JOSEPH STROBL,

Plaintiff-Appellee
Cross-Appellant,

v.

NEW YORK MERCANTILE EXCHANGE, et al.,

Defendants

JOHN R. SIMPLOT, et al.,

Defendants-Appellants
Cross-Appellees.

NOTICE OF MOTION FOR STAY OF ISSUANCE OF THE MANDATE

Motion By:	OPPOSING COUNSEL:
CURTIS, MALLET-PREVOST, COLT & MOSLE	LOVELL & STEWART
(212) 696-6000	(212) 608-1900
Peter Fleming Jr.	Christopher Lovell

Has consent of opposing counsel:	
A. been sought?	(X) Yes ( ) No
B. been obtained?	( ) Yes (X) No
Has service been effected?	(X) Yes ( ) No
Is oral argument desired? (*Substantive motions only*)	( ) Yes (X) No

Requested return date:
(*See Second Circuit Rule 27(b)*) July 25, 1985

Has argument date of appeal been set:
A. by scheduling order? ( ) Yes ( ) No NA
B. by firm date of argument notice? ( ) Yes ( ) No NA
C. If Yes, enter date: Appeal argued February 13, 1985

Judge or agency whose order is being appealed:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below: (X) Yes ( ) No
(*See F.R.A.P. Rule 8*)

Would expedited appeal eliminate need for this motion? ( ) Yes (X) No

If No, explain why not: Defendants-Appellants/Cross-Appellees intend to file a petition for a writ of certiorari after July 26, 1985, the date on which the mandate of the 2nd Circuit will issue.

Will the parties agree to maintain the status quo until the motion is heard: ( ) Yes (X)

Brief statement of the relief requested: Order staying the issuance of the mandate pending the filing by Defendants-Appellants/Cross-Appellees John R. Simplot, et al. ("Defendants") of a petition for a writ of certiorari in the Supreme Court and pending the receipt of notice of the filing by the Clerk of the Second Circuit.

By: (*Signature of attorney*)

July 22, 1985

Peter Fleming Jr.

Appearing for: (Name of party)
John R. Simplot, J.R. Simplot Company, Simplot Industries, Inc., P.J. Taggares, P.J. Taggares Company and SimTag Farms

Appellant or Petitioner:
( ) Plaintiff (X) Defendant
Appellee or Respondent:
( ) Plaintiff ( ) Defendant

ORDER

IT IS HEREBY ORDERED
that the motion be and it hereby is denied

WILFRED FEINBERG
WILFRED FEINBERG, Chief Judge

WILLIAM H. TIMBERS
WILLIAM H. TIMBERS

RICHARD J. CARDAMONE
RICHARD J. CARDAMONE
Circuit Judge

August 20, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Docket Nos. 84-7328, 84-7770

JOSEPH STROBL,

Plaintiff-Appellee
Cross-Appellant,

v.

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON AND MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., BEN PRESSNER, PRESSNER TRADING CORP., JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT, a/k/a J.R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., SIMPLOT PRODUCTS COMPANY, INC., PETER J. TAGARES a/k/a PETER J. TAGGARES, P.J. TAGGARES COMPANY, C.L. OTTER, SIMTAG FARMS, KENNETH RAMM, A & B FARMS, INC., HUGH D. GLENN, GEARHEART FARMING, INC., ED MCKAY, HARVEY POLLAK, HENRY POLLAK, HENRY POLLAK, INC., HENRY A. POLLAK & COMPANY, INC., ROBERT REARDON a/k/a BOBBY REARDON, F.J. REARDON, INC., ALEX SINCLAIR, SINCLAIR & COMPANY, STEPHEN SONDHEIMER, CHARLES EDELSTEIN, JAMES LANDRY a/k/a JIM LANDRY and JERRY RAFFERTY, jointly and severally,

Defendants.

JOHN R. SIMPLOT, J.R. SIMPLOT CO., SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Defendants-Appellants
Cross Appellees.

March 20, 1984.

Reargument Denied July 11, 1984.

OPINION

MACMAHON, District Judge.

The lengthy procedural history of this case may be traced through the following decisions which also provide excellent background and an understanding of commodity futures markets in general and Maine potato futures in particular: *National Super Spuds, Inc. v. New York Mercantile Exchange*, 470 F. Supp. 1256 (S.D.N.Y. 1979) (denying implied right of action under Commodity Exchange Act, 7 U.S.C. §§ 1 et seq., and dismissing claims under the Act), *rev'd sub nom. Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980) (reinstating claims under Commodity Exchange Act) (extensive discussion of commodity futures markets and operation), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982). *See also National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F. 2d 174 (2d Cir. 1979) (discovery motion in class action).

This case arose from:

> "the much publicized default in May 1976 of Maine potato futures contracts, when the sellers of almost 1000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country. 470 F.Supp. at 1285 (footnote omitted).

Leist v. Simplot, supra, 638 F.2d at 285.

Defendants Simplot and Taggares, and the companies they control, are major potato processors with operations based in Idaho and Washington, respectively. Simplot processed over 2.5 billion pounds of potatoes in 1975-1976. According to his own testimony, his companies are "the biggest potato processors and the [sic] handlers, I guess, in America, or probably the world." Compared to Simplot, Taggares is a small processor; nevertheless, in 1975-1976, he processed over 650 million pounds of potatoes.

Plaintiff was a speculator in April and May 1976 Maine potato futures contracts. He purchased long contracts and liquidated them prior to the close of trading.[1]

In essence, plaintiff claimed that the price at which he liquidated his contracts was artificially low because of a successful conspiracy between defendants to manipulate downward the price of May 1976 Maine potato futures ("Maine futures"). Plaintiff further contended that he lost money as a result of liquidating at an artificially low price and sought as damages the difference between what he actually received when he liquidated his position and what he would have received but for defendants' manipulation.

Following an eleven-day trial, the jury was charged on the following claims: (1) that defendants conspired to tamper with, fix or depress the price of Maine futures in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) that defendants manipulated or attempted to manipulate the price of Maine futures in violation of Section 9(b) of the Commodity Exchange Act, as amended, 7 U.S.C. § 13(b); (3) that defendants held short positions in excess of 150 car lots in Maine futures, without being bona fide hedgers, in violation of Section 4(a) of the Commodity Exchange Act, *supra*, 7 U.S.C. § 6(a), and the rules promulgated thereunder, 15 C.F.R. § 150.10; and (4) that defendants committed fraud on the Maine futures market in violation of New York common law.

The jury returned a verdict for plaintiff on all claims and awarded $460,000 in damages. This sum was trebled, pursuant

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1 Maine potato futures contracts are traded on the New York Mercantile Exchange. Although familiarity with futures trading is assumed, a brief explanation of terminology used in our opinion may prove helpful.

Transactions on the Exchange are typically expressed in terms of the sale (selling short) or purchase (buying long) of a contract, a standardized Exchange agreement under which the seller (the short) commits himself to deliver, or the buyer (the long) to accept delivery of a specified quantity at a specified time and price fixed in bidding by open outcry on the Exchange floor. Delivery may be avoided by either the short buying long or by the long selling short on the futures exchange an equal number of offsetting contracts (liquidation). *See* T. Hieronymus, Economics of Futures Trading 38-44 (1971).

to Section 4 of the Clayton Act, 15 U.S.C. § 15, and judgment was entered.

Defendants now move for judgment notwithstanding the verdict, or, in the alternative, for a new trial. We deny the motion in all respects. The following opinion treats individually the various grounds for defendants' motion.

I

Legal Sufficiency of the Evidence of Conspiracy

A. *Conspiracy: Judgment Notwithstanding the Verdict*

Defendants move for judgment notwithstanding the verdict, Fed.R.Civ.P. 50(b), on the ground that there was insufficient evidence from which a jury could conclude that defendants conspired to manipulate the Maine potato futures market, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Our scope of review on this motion is very narrow. We view the evidence in the light most favorable to plaintiff—the party who secured the verdict—and we give plaintiff "the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn." *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir. 1976) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S. Ct. 1404, 1409, 8 L. Ed. 2d 777 (1962)). We keep in mind, of course, that the jury's role as finder of fact does not permit it to base its verdict on confusion, speculation or prejudice. *Id.* at 1042. Nevertheless, if there can be more than one reasonable conclusion derived from the evidence, the court cannot substitute its own conclusion for that of the jury's equally tenable conclusion.

Turning to defendants' argument, we note first that other elements aside, the essence of a violation of § 1 of the Sherman Act requires proof of a contract, combination or conspiracy. It is axiomatic in conspiracy cases that there is rarely direct evidence of unlawful agreement, but such an agreement may be proven by "inferences that may fairly be drawn from the behavior of the alleged conspirators." *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir. 1982). Such

circumstances and inferences must "[a]t a minimum . . . suggest a commitment to a common end." *Michelman v. Clark-Schwebel Fiber Glass Corp., supra*, 534 F.2d at 1043.

Defendants' argument that there was insufficient evidence to find conspiracy rests on two related propositions. First, defendants contend that their actions occurring after May 4th, the date on which plaintiff liquidated his position in the market, should not have been admitted at trial and cannot now be relied upon by plaintiff as evidence of conspiracy. Second, defendants contend that excluding post-May 4th evidence, the evidence merely shows one incident of parallel conduct, *i.e.*, both held relatively large open short positions, which is insufficient to infer conspiracy.

We have previously rejected defendants' first proposition, and they have cited no cases in support of the position. This is not surprising, however, since it is well established that evidence of conspiracy, even if occurring before or after plaintiff's damage period, is relevant to proving the existence of the conspiracy as well as the intent, motive and method of the conspirators. *Continental Ore Co. v. Union Carbide & Carbon Corp., supra*, 370 U.S. at 709-10, 82 S. Ct. at 1415-16; *Ambook Enterprises v. Time Inc.*, 464 F. Supp. 1127, 1142 (S.D.N.Y.), *rev'd in part on other grounds*, 612 F.2d 604 (2d Cir.1979), *cert. dismissed*, 448 U.S. 914, 101 S. Ct. 35, 65 L. Ed 2d 1179 (1980). The jury need not examine the conspiracy in a vacuum, *Continental Ore Co., supra*, 370 U.S. at 710, 82 S. Ct. at 1416, and the trial court has wide discretion in admitting evidence which tends to establish conspiracy. *E.g. Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 697 (9th Cir. 1977).

The post-May 4th acts occurred between May 4th and June 1st. This period encompassed both the closing and delivery period on the May contract. Liquidation activity and delivery (or default) which occurred during this period is, in effect, the climax of all previous trading in the contract. Therefore, it is beyond peradventure that defendants' conduct during this period is relevant to the existence of a conspiracy to depress artificially Maine futures prices, and the evidence was admissible for this purpose.

Having found that actions which occurred after May 4th were admissible to prove conspiracy, defendants' second proposition also fails. We agree that parallel conduct, without more, is insufficient to infer conspiracy. *See Ambook Enterprises, Inc. v. Time, Inc., supra*, 612 F.2d at 612. Yet, this principle is of no help to defendants because there is ample additional evidence here which supports a jury finding of conspiracy. We shall briefly review some of these "plus factors."[2]

First, there was sufficient evidence that defendants shared a common motive to lower the price of May futures. Both defendants were large potato processors in the Northwest, and during the relevant period they had very substantial processing needs for physical potatoes. Both defendants knew that Northwestern potato farmers, from whom defendants bought the bulk of their potatoes, looked to the price of Maine futures when negotiating the price of forward contracts with defendants. Thus, both defendants shared a motive to depress the price of Maine futures and thereby reduce the real cost of potatoes purchased in the cash market or through forward contracts for their processing business.[3]

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2 "Plus factors" are "other facts that serve to transform parallelism into conspiracy (or allow a jury to do so)." P. Areeda, Antitrust Analysis 372-73 (3d ed. 1981). Professor Areeda discusses at least five "plus factors," including evidence of a common motive and traditional circumstantial evidence of agreement, such as conduct by the alleged conspirators which appears very unlikely in the absence of agreement. And in *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), the court noted three " 'plus' factors such as [1] those emphasized in the simple refusal to deal cases . . .; [2] parallelism of a much more elaborate and complex nature; [3] a web of circumstantial evidence pointing very convincingly to the ultimate fact of agreement." *Id.* at 205-06 n. 19.

3 There was ample evidence from which the jury could reach this conclusion. For example, defendant Taggares testified:

> "Q. Mr. Taggares, in 1976 if the Maine potatoes futures prices went up, would the farmer want to get more money for his potatoes based on that?
>
> A. Yes.
>
> * * * * *
>
> Q. Now, Mr. Taggares, when you were trading in the futures contracts from March to May 1976, the real dollars involved to you

(Footnote continued on following page)

Obviously, defendants could more effectively ensure the success of their market manipulation, and better spread the risk of loss, by coordinating their market activity. For example, the evidence showed that defendants and their alleged co-conspirators eventually held a combined interest of approximately 98% of the total unliquidated short positions in Maine futures. Without concerted effort, it is doubtful that any individual trader would have successfully amassed such a dominant percentage interest or exerted such downward pressure on market price.

In addition to presenting credible evidence of motive as indirect proof of agreement, *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 287, 88 S. Ct. 1575, 1591, 20 L. Ed. 2d 569 (1968); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939), plaintiff produced substantial circumstantial evidence of agreement. We shall now outline the "web of circumstantial evidence pointing very convincingly to the ultimate fact of agreement." *Delaware Valley Marine Supply Co. v. American Tobacco Co.* 297 F.2d 199, 205 n. 19 (3d Cir. 1961).

The evidence showed that defendants met and had numerous telephone conversations during the conspiracy period; that trading Maine futures was discussed; and that each defendant knew that the other was trading short in the Maine contract. The evidence also showed that defendant Simplot sent $1

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were the effect on your cash market operation, not what you had at risk in the futures market; isn't that correct? Yes or No."

A. Yes." (Tr. 526, 531.)

Gerald Murphy was general manager of the Potato Growers Association of Idaho and represented potato growers in their unsuccessful forward, or pre-season, contract negotiations with J.R. Simplot in March 1976. Mr. Murphy was familiar with the economics of potato growing, processing and marketing. He testified:

'Q. Did Maine potato futures contract prices play a part in the [forward contract] negotiations?

A. Yes. The position of bargaining associations, including potato growers of Idaho on price objectives, is developed based on indicators such as the Maine potatoes futures contract, the current cash markets for potatoes and any previous settlements of contracts, if there were any, as well as the history of the contract settlements in recent years; and, additionally, cash or cash markets for the finished products." (Tr. 251.)

million to defendant Taggares to open a futures trading account in the name of their partnership, SimTag Farms. After opening the account, SimTag Farms, like its partners, acquired a substantial short position in Maine futures, pooled its liquidation orders through the same broker as defendants, failed to liquidate, and eventually defaulted on its open short contracts.

Defendants cite numerous cases for the proposition that communication or close relations between defendants is insufficient to infer agreement. *E.g., Venture Technology, Inc. v. Natural Fuel Gas Co.*, 685 F.2d 41, 45 (2d Cir. 1982); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980). In these cases, plaintiff failed to offer any credible evidence of agreement in addition to the showing of communication and opportunity to agree. In the instant case, however, plaintiff has presented additional evidence of agreement. Therefore, the jury could properly consider and indeed give "paramount importance" to defendants' frequent communication and admitted discussion of Maine futures. *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851, 857 (N.D. Cal. 1975). *See also Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 245 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572 (1977) (upholding jury verdict where price parallelism accompanied by meetings, telephone calls, internal communication).

Several examples of unusual parallel conduct which occurred shortly after May 4th presented additional circumstantial evidence which the jury could consider in determining the existence of a conspiracy. The evidence showed that the general, if not exclusive, practice among traders in Maine futures contracts is to liquidate their positions, *i.e.*, offset short contracts by buying long contracts, or vice versa, on or before the last day of trading. Nevertheless, both defendants, the interests they controlled, and their alleged co-conspirators failed to liquidate their short positions before trading ended.[4] This

4 At the close of trading in Maine futures on May 7, 1976, Simplot held 727 open, or unliquidated, short contracts; Taggares held 368 open short contracts; and SimTag Farms held 440 open short contracts.

parallel conduct is consistent with a motive to lower futures prices because, as expert testimony revealed, failing to liquidate short contracts with offsetting long contracts withholds normal demand from the market and exerts artificial downward pressure on price.

Yet another example of unusual parallel conduct, consistent with a motive to lower price, is the fact that defendants failed to deliver on, or otherwise satisfy, a substantial number of their open short contracts.[5] Expert testimony established that defaulting on short futures contracts is highly irregular and has the effect of depressing market price.[6]

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5 One thousand of the 1,911 short contracts which were open at the end of trading were never satisfied. At the end of the delivery period on May 25, 1976, Simplot had failed to satisfy 467 contracts, and Taggares had failed to satisfy 326 contracts.

6 For example, plaintiff's expert, Professor Gray, testified:

"Q. Other than what you've already testified to, did you observe any other acts in this record that were the type of act that could result in a price not reflective of supply and demand as you testified?

A. Yes. I did.

Q. What is that?

A. Continuing beyond the failure to liquidate, because the liquidations could only occur on May the 7th. That's the last day under the rule that these can be traded.

Now, if you haven't liquidated, you're obliged to make delivery during the subsequent delivery period.

* * * * *

During the subsequent delivery period, when having failed to liquidate, these positions were required to obtain potatoes and delivered again under the rules, the potatoes were not obtained and deliveries were not made. So ultimately there was default on the contract. And the default applied, as I recall, to roughly half of these short positions.

Q. It's a matter of record that there were 1,000 defaulted contracts on 1911 open position at the end of trading.

How would the failure to deliver have any effect on prices?

A. Again, in order to make delivery one is going to have to go and buy potatoes, potatoes which have to meet the quality specifications on the contract, and have to be shipped into the market. So that's a demand for potatoes which demand was kept from the market because the potatoes weren't purchased.

* * * * *

(Footnote continued on following page)

The evidence also showed that defendants engaged in identical and unusual conduct by placing limit orders rather than market orders to liquidate their open short position on the last day of trading.[7] Moreover, the evidence showed that defendants explicitly agreed to place their liquidation orders, as well as SimTag Farms', with the same floor broker. Expert testimony established that both actions had the effect of artificially reducing demand and lowering the price of Maine futures.

We have now outlined, and by no means exhausted, the evidence of common motive and circumstantial evidence of conspiracy presented at trial. Thus, this case is wholly unlike *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954), on which defendants principally rely. In that case, the Court affirmed the denial of a directed verdict for plaintiff because

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> Q. All right. Now, I understand that failure to deliver withholds a demand or buying pressure in the market. Is that what you just testified to, Professor Gray?
>
> A. Yes.
>
> Q. Over time, if you look at the context of the short position over time, then a failure to liquidate, then a failure to deliver, in economic terms, can you give a description of what that represents to the marketplace?
>
> * * * * *
>
> A. What that represents to the marketplace over the period of time is, as this position is built up and not being liquidated and as it gets larger, then there is increasing downward pressure on prices." (Tr. 896-98).

7 A market order refers to a direction to the brokerage company, or its floor trader, to purchase a given number of futures contracts at the current market price. For example, to close out, or liquidate, a short position of fifty contracts on the last day of trading an order for fifty long contracts "at market" might be placed. The broker would then purchase fifty long contracts at the going market price. A limit order, on the other hand, specifies a level which the market price must reach before offsetting futures contracts are purchased.

The evidence showed that on the last day of trading, defendants placed limit orders for offsetting long contracts at a price specification substantially below the market price. Consequently, defendants did not obtain sufficient long contracts.

defendants had offered evidence of independent business reasons sufficient to contradict the inference of conspiracy from their parallel conduct. The record revealed no additional evidence of conspiracy.[8]

Similarly, *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 111 (2d Cir. 1975), is inapposite. In that case, the court affirmed the district court's grant of summary judgment for defendant because plaintiff simply failed to contradict defendant's "overwhelming" and "undisputed" evidence that each defendant acted unilaterally and independently. *Id.* at 111-12. In this case, however, defendants' evidence was neither overwhelming nor uncontradicted.

Defendants did offer explanations for their conduct. For example, they presented evidence to show that they were short in Maine futures because they were hedging their inventory of physical and processed potatoes. But plaintiff contradicted this evidence with evidence that defendants were actually in need of potatoes for their processing businesses and therefore should have been on the long, or buy, side of the market. Plaintiff's expert also offered testimony which cast considerable doubt on defendants' notion that they could hedge their processed potato inventory by trading in the Maine futures market.

Defendants also attempted to show independent business reasons for their parallel failure to liquidate, their use of limit orders, their agreement to place liquidation orders through one broker, and their defaults. Yet, their evidence merely supported contrasting interpretations and, at best, presented contradictory evidence which the jury was entitled to believe or disbelieve, just as it was free to believe or reject plaintiff's evidence and inferences. The jury chose to believe plaintiff's credible

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8 Plaintiff had offered additional evidence of conspiracy in the form of decrees entered into by defendant Paramount in the government's prior equity suit against Paramount. These decrees, however, did not suffice as additional evidence of conspiracy in the *Theatre Enterprises* suit. The Court stated: "Alone or in conjunction with the other proof of petitioners, they would form no basis for a directed verdict." *Theatre Enterprises, supra*, 346 U.S. at 541, 74 S. Ct. at 260. Therefore, plaintiffs had to rely solely on their evidence of parallelism.

version over defendants', and it is not our prerogative in such a case to usurp the jury function by second guessing.

Thus, having reviewed all the evidence, including but not limited to that which is outlined above, we cannot say that

> (1) there is such a complete absence of evidence supporting the verdict that the jury's finding could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.

Mallis v. Bankers Trust Co., 717 F.2d 683, 688 (2d Cir. 1983). Therefore, we deny defendants' motion for judgment notwithstanding the verdict on the issue of conspiracy.

B. *Conspiracy: New Trial*

Defendants move for a new trial, in the alternative to their motion for judgment n.o.v., on the issue of conspiracy. Bearing in mind that the standard of review in a motion for a new trial is somewhat less stringent that for judgment n.o.v., *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978), we nevertheless deny the motion.

Defendants offer no additional arguments in support of a new trial, and we certainly cannot say on the record before us that the jury's finding of conspiracy, based on all the evidence, is a "seriously erroneous result or represents a miscarriage of justice." *Mallis v. Bankers Trust Co., supra*, 717 F.2d at 691. Thus, we deny defendants' motion for a new trial as it pertains to the jury's finding that defendants conspired to restrain trade in violation of § 1 of the Sherman Act.

II.

Legal Sufficiency of the Evidence of Artificial Price

Plaintiff argues that defendants cannot challenge the legal sufficiency of the evidence of artificial price on their motion

for judgment n.o.v. because they failed to assert it as a ground for their motion for a directed verdict at trial. We agree. Rule 50(a), Fed.R.Civ.P., requires that a motion for a directed verdict state the specific grounds for the motion. Since the motion for judgment n.o.v. is actually a renewal of the motion for a directed verdict, it is clear that the moving party is bound by the grounds raised on the directed verdict motion. *U.S. Industries, Inc. v. Blake Construction Co.*, 671 F.2d 539, 548 (D.C. Cir. 1982); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975). *See also* 5A Moore's Federal Practice ¶ 50.08.

We have examined the transcript in detail to determine whether defendants raised the issue of the insufficiency of the artificial price evidence in their motion for a directed verdict. At the close of plaintiff's case, defendants' counsel clearly stated that the grounds for his motion were the insufficiency of the evidence of a conspiracy between Simplot and Taggares and an argument that the antitrust claim should be dismissed in light of the remedy afforded by the Commodity Exchange Act (Tr. 1020-27). At the close of defendants' evidence, counsel reiterated the motion (Tr. 1129), but at no time did he raise the issue which defendants would now have us consider. Defendants' reference to a footnote in their November 14, 1983 memorandum in support of their motion for a directed verdict is unavailing, especially since it appears as part of their argument that the evidence of conspiracy is insufficient. We therefore conclude that defendants are precluded on the judgment n.o.v. motion from relying on a ground not raised on the directed verdict motion.

In any event, there was sufficient evidence of artificial price to withstand either the motion for judgment n.o.v. or the motion for a new trial. As we outline in detail below in our discussion of the alleged excessiveness of the verdict, evidence of low supply of Maine potatoes in 1976 and high export demand for them in Europe provided a basis for the jury's finding that the price of the May potato futures contract was artificially low. Additionally, the testimony of plaintiff's expert witness, Professor Gray, was evidence from which the jury

could have concluded that the price of Maine futures was artificially low. In fact, Professor Gray testified specifically that, in his opinion, the prices of Maine futures in 1976 were not reflective of supply and demand (Tr. 903-04). We therefore conclude that defendants' motion based on the legal sufficiency of artificial price evidence must be denied.

III.

Excessiveness of the Verdict

We conclude that the $460,000 verdict reached by the jury is not irrational and excessive, and we therefore find no basis for granting either defendants' motion for judgment n.o.v. or their notion for a new trial. The trial court can only grant judgment n.o.v. when there is but one reasonable conclusion which the jury could have reached. *C-Suzanne Beauty Salon, Ltd. v. General Insurance Co.*, 574 F.2d 106, 112 n. 10 (2d Cir. 1978). Defendants' argument that there is no basis in the evidence for the jury's damage award is totally without merit, and, although the jury might have reached a different verdict, we think the one it did reach is reasonable. Defendants' motion for judgment n.o.v. must be denied.

On a motion for a new trial based on the excessiveness of the verdict, the trial court should set aside the verdict "only if the amount awarded is so excessive as to compel the conclusion that it is the result of passion or prejudice or is shocking to the 'judicial conscience'." *Dagnello v. Long Island R. Co.*, 193 F. Supp. 552 (S.D.N.Y. 1960), *aff'd*, 289 F.2d 797 (2d Cir. 1961). *See also Bevevino v. Saydjari, supra*. Once the jury determined that defendants unlawfully manipulated Maine potato futures prices in 1976, it was entitled to make a reasonable damage award in light of the evidence presented. We find that the jury in this case did just that.

A review of the evidence confirms our conclusion that the verdict was in fact reasonable. Plaintiff liquidated his May contracts on April 23 and May 4, at an average price of $9.25. Having found that defendants' manipulation resulted in artifi-

cially low prices during the conspiracy period, the jury had to determine what the prices would have been absent the manipulation. In essence, the jury was required to estimate how much higher the prices would have been when plaintiff liquidated his contracts but for defendants' unlawful conduct, and the court so instructed it. The $460,000 figure reached by the jury, therefore, was the equivalent of a finding that the price of the May potato futures contract would have been approximately $18.00, instead of $9.25, had the market been operating solely on the basis of supply and demand. The question before us is whether that finding has resulted in a verdict so high that it represents a miscarriage of justice.

We note first that plaintiff introduced evidence of an unusually low supply of Maine potatoes after the 1975 harvest. In fact, there was evidence that the 1975 crop was the lowest on record (P-1(E)3 and Tr. 65-66). Furthermore, there was evidence that an April 13, 1976 report issued by the United States Department of Agriculture indicated an unusually low supply of Maine potates on hand on April 1 (P-1(E)3). The estimate in this report was later revised upward, but that revision was in August, long after it could have had any effect on investors in the May futures contract (Stipulated Facts 8-9). The jury could have concluded from the evidence of low supply that the price of Maine potato futures was artificially low during the conspiracy period.

Similarly, plaintiff introduced evidence of an unusually large European export demand in 1976 (P-1(E)2). This high demand was reflected in the statistics of potatoes exported and in the tremendous price increase for potatoes in Europe (P-3(A)). Testimony at trial corroborated the impact of the export demand on the market (Tr. 68-74) and further justified the jury's finding that the price of Maine potato futures would have been higher absent unlawful manipulation.

The testimony of plaintiff's expert, Professor Gray, is also significant here. Professor Gray concluded that in a properly operating market "the top of the range [of prices for Maine potato futures] could have been $15 or higher." (Tr. 915.) He went on to testify that this estimate was based on "[p]rices two

years earlier, with similar circumstances but not with such an extreme export demand and not with such a shortage of Maine potatoes." (Tr. 915.) The jury was not required to accept Professor Gray's testimony, but it certainly was entitled to do so, and its finding that the price would have been about $18.00 is not unreasonable in light of that testimony.

We acknowledge that this was a difficult case for the jury to determine the damage award precisely. In this context, however, it is clear that the jury's verdict should not be set aside as long as it represents a reasonable and fair estimate in light of the available proof. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-66, 66 S. Ct. 574, 579-81, 90 L. Ed. 652 (1946); *Lee v. Joseph E. Seagram & Sons, Inc.*, 552 F.2d 447, 455 (2d Cir. 1977); *Brink's Inc. v. City of New York*, 546 F. Supp. 403, 410-11 (S.D.N.Y 1982). Since it was their unlawful conduct which not only damaged plaintiff, but also made the calculation of those damages difficult, defendants cannot now complain about the lack of exactitude in the jury's ultimate verdict. *See Sarlie v. E.L. Bruce Co.*, 265 F. Supp. 371, 375-76 (S.D.N.Y. 1967).

IV.

Conduct of Plaintiff's Counsel

Defendants' final argument on their motion for a new trial is based on allegedly improper conduct by plaintiff's counsel during the trial. Defendants assert that a new trial should be granted because plaintiff's counsel expressed his personal opinions to the jury during summation while discussing defendants' failure to liquidate, their default, and their claim that they were engaged in legitimate hedging. They also point to counsel's improper reference to Stephen Sondheimer as a convicted felon. We have reviewed these allegations of improper conduct by counsel in the context of the trial as a whole and conclude that they do not merit a new trial.

In ruling on a motion for a new trial based on attorney misconduct, the trial court must determine whether counsel's

conduct created undue prejudice or passion which played upon the sympathy of the jury. *Dagnello v. Long Island R. Co., supra*, 289 F.2d at 798. *See* 6A Moore's Federal Practice ¶ 59.08[2]. The trial judge has considerable discretion in determining whether a new trial is required. *Draper v. Airco, Inc.*, 580 F.2d 91, 94-97 (3d Cir. 1978).

We note also that "[i]n arguing to a jury, counsel must properly have some latitude so long as prejudice does not appear." *Schwartz v. Northwest Airlines, Inc.*, 275 F.2d 846 (2d Cir. 1960). The comments made by plaintiff's counsel about the default, the failure to liquidate, and hedging were made merely to suggest the kinds of inferences which could legitimately be drawn from the evidence. These comments in the context of the trial as a whole did not constitute the extremely egregious behavior of counsel in *Koufakis v. Carvel*, 425 F.2d 892, 900-05 (2d Cir. 1970), or in *Draper v. Airco, Inc., supra*. Counsel's summation was, in our opinion, based on the evidence and did not contain offensive remarks about defendants or defendants' counsel. It does not necessitate a new trial.

With respect to the admittedly improper reference by plaintiff's counsel to Sondheimer, defendants' counsel immediately moved for a mistrial, and the court immediately instructed the jury to disregard the comment. This instruction made it clear that the reference was improper and unwarranted. We think it adequately protected defendants. *See D C Comics, Inc. v. Filmation Associates*, 486 F. Supp. 1273-84 (S.D.N.Y. 1980).

Accordingly, defendants' motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial is denied in all respects.

So ordered.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket Nos. 84-7328, 84-7770

JOSEPH STROBL,

Plaintiff-Appellee
Cross-Appellant,

v.

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON AND MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., BEN PRESSNER, PRESSNER TRADING CORP., JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT, a/k/a/ J.R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., SIMPLOT PRODUCTS COMPANY, INC., PETER J. TAGARES a/k/a PETER J. TAGGARES, P.J. TAGGARES COMPANY, C.L. OTTER, SIMTAG FARMS, KENNETH RAMM, A & B FARMS, INC., HUGH D. GLENN, GEARHEART FARMING, INC., ED MCKAY, HARVEY POLLAK, HENRY POLLAK, HENRY POLLAK, INC., HENRY A. POLLAK & COMPANY, INC., ROBERT REARDON a/k/a BOBBY REARDON, F.J. REARDON, INC., ALEX SINCLAIR, SINCLAIR & COMPANY, STEPHEN SONDHEIMER, CHARLES EDELSTEIN, JAMES LANDRY a/k/a JIM LANDRY and JERRY RAFFERTY, jointly and severally,

Defendants.

JOHN R. SIMPLOT, J.R. SIMPLOT CO., SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Defendants-Appellants
Cross Appellees.

July 11, 1984

OPINION

MACMAHON, *District Judge*

This case arose from the massive default in 1976 by short position holders in the market for May 1976 Maine potato futures contracts. *See Leist v. Simplot*, 638 F.2d 283, 285 (2d Cir.), *aff'd sub nom. Merrill Lynch, Pierce Fenner & Smith v. Curran*, 456 U.S. 353, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982). In November 1983, following an 11-day jury trial, a verdict was returned against defendants. On March 20, 1984, we denied defendants' motion for judgment notwithstanding the verdict or for a new trial. *Stroble v. New York Mercantile Exchange*, 582 F. Supp. 770 (S.D.N.Y. 1984).

In yet another round of post-trial motions, defendants now move for (1) a new trial based on newly discovered evidence, Fed.R.Civ.P. 59, 60(b); (2) reargument of their prior post-trial motions for judgment notwithstanding the verdict or for a new trial, Local Rule 3(j); and (3) reduction of plaintiff's award by the amount of his settlement payments. Additionally, plaintiff moves for prejudgment interest.

Newly Discovered Evidence

Defendants contend that the "factual findings" contained in an "Initial Decision on Default" by an Administrative Law Judge ("ALJ"), *In re Collins,* 2 Comm.Fut.L.Rep. (CCH) ¶ 21,960 (Commodity Futures Trading Commission 1984), constitute newly discovered evidence warranting the grant of a new trial. We find defendants' argument seriously flawed.

Both Rule 59(a) and 60(b)(2), Fed.R.Civ.P., provide in effect that the court may grant a new trial on the ground of "newly discovered evidence which by due diligence could not have been discovered" at the time of the trial.[1] It is beyond perad-

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1 As noted in the text, *supra*, by amended notice of motion, defendants' motion for a new trial based on newly discovered evidence is premised on both Fed.R.Civ.P. 59 and 60(b). Each of these rules provides a different time

(Footnote continued on following page)

venture that "newly discovered evidence" refers to evidence in existence at the time of the trial. . . . " *Campbell v. American Foreign S.S. Corp.*, 116 F.2d 926 (2d Cir.), *cert. denied*, 313 U.S. 573, 61 S.Ct. 959, 85 L.Ed. 1530 (1941). Similarly, in *Ryan v. United States Lines Co.*, 303 F.2d 430 (2d Cir. 1962), the court stated: "Rule 60(b)(2), pertaining to newly discovered evidence, permits reopening a judgment only on the discovery of evidence in existence and hidden at the time of the judgment. . . ." *Id.* at 434. *See also Prostrollo v. University of South Dakota*, 63 F.R.D. 9, 11, (D.S.D. 1974) (no relief "for evidence which has only come into existence after the trial is over"); *In re Boeing Airplane Co.*, 2 F.R.Serv.2d 927 (D.D.C.1959); 11 Wright & Miller, Federal Practice and Procedure § 2808 at 55 & n. 94 (1973 & Supp.1983); 6A Moore's Federal Practice ¶ 59.08[3] at 59-100 (rev. 2d ed. 1982).

The proffered evidence upon which defendants rely is the "factual findings *contained in* the *Collins* decision and not . . . hearing testimony underlying those findings." Defendants' Reply Memorandum of May 11, 1984, at 3 (emphasis in original). But, as defendants correctly note, "The *Collins* decision was issued and published *after* the conclusion of the trial." *Id.* (emphasis supplied). Thus, defendants' evidence—the ALJ's findings—was not in existence at the time of the trial. Consequently, these "findings" are not "newly discovered evidence." *Ryan, supra; Campbell, supra.*

Moreover, the proffered evidence must be admissible to qualify as newly discovered evidence. *E.g.*, 6A Moore's Federal Practice ¶ 59.08[3] at 59-102 (rev. 2d ed. 1982). The evidence proffered here is hearsay because the ALJ's "findings" are out of court statements offered for the truth of the matter asserted. Fed.R.Evid. 801(c).

Defendants, relying on Fed.R.Evid. 803(8)(C), argue that the findings fall within an exception to the hearsay rule as

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within which the motion must be made. However, the substantive standards under both rules are essentially identical. "What constitutes newly discovered evidence is substantially the same, whether the motion is made under rule 59(b) or Rule 60(b)." 6A Moore's Federal Practice ¶ 59.08[3] at 59-98 (rev. 2d ed. 1982) (footnote omitted).

"factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

This exception must be applied "in a commonsense manner," especially "in determining whether the hearsay document . . . has sufficient indicia of reliability to justify its admission." *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir.), *cert. denied sub nom. Rockwell Int'l Corp. v. City of New York*, 454 U.S. 1164, 102 S. Ct. 1038, 71 L. Ed. 2d 320 (1981). Considering the source of the information and the circumstances under which that information was transformed into "findings of fact," we conclude that the evidence lacks sufficient indicia of trustworthiness to qualify for admission under 803(8)(C). *See City of New York v. Pullman Inc., supra*, 662 F.2d at 914-15; *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1125, 1146-49, 1180-81 (E.D. Pa. 1980); Notes of Advisory Committee, Fed.R.Evid. 803(8)(C), 28 U.S.C.A. at 590 (West 1975); 4 Weinstein's Evidence ¶ 803(8)[03] at 803-206 (1981).

The ALJ's decision, by its own terms, is simply an "Initial Decision on Default." *In re Collins, supra*, ¶ 21,960 at 28,134. The administrative proceeding was commenced by the Commodity Futures Trading Commission's Division of Enforcement. The complaint, in essence, alleged that respondents attempted to manipulate upward the price of May 1976 Maine potato futures contracts and exceeded maximum net short positions for potato futures contracts established by the Commission. *Id.* at 28,134 to 135. Although the respondents in the proceeding filed answers to the complaint,[2] the ALJ specifically noted that:

> At no time during the course of the hearing in this matter did [respondents] appear at the hearing, nor did

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2 The ALJ's decision states only that respondents "filed answers to the complaint." Thus, we cannot determine whether the answers were, for example, general or specific denials and what further assertions, if any, were made by respondents.

> any of these respondents comply with § 10.62(b) of the Rules of Practice . . . by filing notices of appearance indicating an intention to continue participating in the proceeding. Neither have these respondents filed any proposed findings of fact, conclusions of law or briefs subsequent to the hearing in this proceeding.

In re Collins, supra, at 28,135 (footnote omitted).[3]

The Division of Enforcement then moved for a default order and entry of findings and conclusions based on the allegations of its complaint, pursuant to § 10.93 of the Commission's rules. 17 C.F.R. § 10.93 (1983). That section provides that when a respondent in a Commmodity Futures Trading Commission hearing before an ALJ fails to appear or file a notice of appearance, the ALJ may "enter findings and conclusions and a default order against that respondent based upon the matters set forth in the complaint, which shall be deemed to be true for the purposes of this determination." *Id.*

Accordingly, the ALJ entered a default order against respondents and simply adopted the allegations of the complaint as his findings of fact: "Therefore, findings of fact, conclusions of law, and a default order shall be entered against the . . . respondents . . . taking the matters set forth in the complaint to be true for the purposes of determining the issues against them." *In re Collins, supra*, at 28,135.

The findings here are similar to those in *Zenith Radio Corp. v. Matsushita Electric Industrial Co., supra*. There, an administrative agency's findings were deemed untrustworthy be-

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3 The omitted footnote stated that "[a]lthough Collins testified at the hearing as a Division [of Enforcement] witness, he did not enter an appearance." Thus, while it appears that one respondent chose to testify on behalf of the Division, he also failed to present his own case. In any event, in this motion defendants have specifically stated that they do not rely on the hearing testimony as the "newly discovered evidence." Defendants' Reply Memorandum of May 11, 1984, at 3. Indeed, they could not rely on such testimony because these hearings were held well before this trial and there is no showing that the substance of the testimony was unavailable to defendants at trial.

cause they were simply "copied verbatim without review" from the "accusatory document" filed by the agency's Enforcement Division staff. *Id.* at 1180.

Moreover, because the findings there were based solely upon an agency investigation proceeding—the agency's formal fact finding hearing—the court held that the purported findings were "simply too preliminary to be trustworthy within the meaning of [Fed.R.Evid.] 803(8)(C)." *Id.* Similarly, in *City of New York v. Pullman, Inc., supra*, 662 F.2d at 914, an interim report subject to revision and review did "not satisfy the express requirement of the rule that the proffered evidence must constitute the 'findings' of an agency or official."

Here, as we have seen, the ALJ, pursuant to 17 C.F.R. § 10.93, essentially rubber stamped the allegations of the Enforcement Division's complaint as his findings of fact for the limited purpose of entering an initial decision on default. Thus, the proffered "findings" are "findings" in name only. They do not constitute a reasoned result based on an impartial weighing of evidence and the operation of a disinterested mind. *Cf. United States v. El Paso Gas Co.*, 376 U.S. 651, 656-57, 84 S. Ct. 1044, 1046-47, 12 L. Ed. 2d 12 (1964). In short, they are not the result of a review on the merits by the agency fact finder, as contemplated by Fed.R.Evid. 803(8)(C).

The proffered findings are further suspect because there is no evidentiary support whatever for determining the source or reliability of the allegations made in the Enforcement Division's complaint. These allegations were adopted mechanically without the exercise of any judgment whatever by the ALJ. The findings are, therefore, subject to the same deficiency, in terms of assessing trustworthiness, as the allegations in the Enforcement Division's complaint.

Thus, even if newly discovered, the proffered ALJ findings would not serve as a basis for a new trial because they are hearsay and do not satisfy the requirement of trustworthiness under Fed. R. Evid. 803(8)(C).[4]

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4 In light of the two independently sufficient reasons stated in the text for denying defendants' motion, we need not address the numerous addi-

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Motions for Reargument

Defendants move for reargument of their prior motion for a reduction of the verdict, which we denied in our opinion of March 20, 1984. We have carefully reviewed defendants' latest contentions and find them without merit.[5]

In a footnote, defendants also move for reargument of their prior motions for judgment n.o.v. or for a new trial, which we also denied on March 20, 1984. The sole basis of this motion is the purported factual findings of the ALJ in *In re Collins*, *supra*. Having rejected these findings as a basis for a new trial motion, *supra*, defendants' motion for reargument premised on the same findings must also be denied.

The original complaint in this action named 31 defendants, including corporate and individual defendants. Before trial,

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tional requirements a movant for a new trial based on newly discovered evidence must establish. *See* 7 Moore's Federal Practice ¶ 60.23[4] at 60-198 to 203 (rev. 2d ed. 1983). However, we note that as part of their case at trial, defendants presented evidence of a "long squeeze" and its purported consequences in the May 1976 Maine potato futures market. Defendants' proffered evidence in the instant motion, if admissible and credible, would lend some support to this claim. Nonetheless, the evidence would be cumulative and certainly not of "such a material and controlling nature as will probably change the outcome." *Id.* at 60-201 to 202. Cumulative new evidence which goes only to the weight and credibility of existing evidence is not a sufficient basis for the extraordinary remedy of a new trial. *County of Trinity v. Andrus*, 77 F.R.D. 29, 31 (E.D. Cal. 1977).

5 For example, defendants contend that plaintiff's counsel, in his summation, conceded that plaintiff was "only entitled to $305,000." Defendants' Memorandum of March 27, 1984. Aside from the fact that plaintiff's counsel's closing arguments are not evidence, defendants' interpretation of the record is simply incorrect. Plaintiff's counsel noted the $305,000 figure as but one of several alternative damage assessments—and one which would give defendants the benefit of their downward price manipulation. Tr. 1212-13. Similarly incorrect is defendants' statement that plaintiff testified that he was "only entitled to $2.00 more per contract then [sic] he received (Tr. 311). . . ." Defendants' Memorandum of March 27, 1984, at 12. Plaintiff never made such a statement, and even a brief review of the testimony preceding and following plaintiff's testimony on page 311 of the transcript highlights defendants' mischaracterization of plaintiff's testimony.

however, plaintiff and most of the defendants agreed to an out-of-court settlement. As part of their settlement agreements, the settling defendants agreed to pay plaintiff a total of $116,375 (hereinafter "settlement payments"). Defendants now move for the deduction of these settlement payments from the award of damages. Plaintiff does not object to this deduction but contends that the deduction should not be made from the award before trebling. Rather, plaintiff argues that the deduction should be from the amount of damages after they have been trebled.[6]

We agree with plaintiff. "The district court should first treble the amount of the jury's verdict and then subtract the [amount] already paid in settlements." *Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118, 130 (2d Cir.), *aff'd*, 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed.2d 330 (1982); *accord Burlington Industries v. Milliken & Co.*, 690 F.2d 380 (4th Cir. 1982).

Prejudgment Interest

Plaintiff moves for an order granting prejudgment interest. The jury returned a verdict for plaintiff on three claims: (1) violation of § 1 of the Sherman Act, 15 U.S.C. § 1; (2) violations of the Commodity Exchange Act, 7 U.S.C. §§ 13(b), 6(a); and (3) violation of New York's common law prohibition of fraud. The jury awarded plaintiff $460,000 in damages.

To the extent that plaintiff's motion is premised on the verdict for plaintiff on the New York common law fraud claim, New York law controls. *See United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 877-78 (2d Cir. 1976); *Spector v. Mermelstein*, 485 F.2d 474, 481-82 (2d Cir. 1973); *Collier v. Granger*, 258 F. Supp. 717, 718 (S.D.N.Y. 1966). New York CPLR § 5001 provides for mandatory recovery of prejudgment interest. N.Y.Civ.Prac.Law § 5001 (McKinney 1963 & Supp.

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6 Plaintiff states that the " 'precise amount' " of settlement payments is $116,375. Plaintiff's Memorandum of April 25, 1984, at 1 (Memorandum refiled on May 30, 1984). Defendants have not challenged this figure.

1983). Such interest is computed "from the earliest ascertainable date the cause of action existed." *Id.* § 5001(b).

Plaintiff selects May 4, 1976, the date on which plaintiff finally liquidated his futures position, as the earliest possible date upon which his cause of action existed. Defendants offer no objection to this date. On May 4, 1976, plaintiff's total damages became ascertainable; therefore, plaintiff is entitled to pre-verdict interest from May 4, 1976 to November 16, 1983, the day before the verdict was rendered. *See United States v. Government Employees Ins. Co.*, 421 F. Supp. 1322 (S.D.N.Y. 1976); *Rock Transport Properties Corp. v. Hartford Fire Ins. Co.*, 312 F. Supp. 341 (S.D.N.Y. 1970). In addition, pursuant to N.Y.Civ.Prac.Law § 5002, plaintiff is entitled to prejudgment interest upon the verdict from November 17, 1983, the date of the verdict, to "the date of entry of final judgment."

Section 5004, N.Y.Civ.Prac.Law, states that "[i]nterest shall be at the rate of nine per centum per annum, except where otherwise provided by statute." However, Section 2, L.1981, c. 258, provides: "This act [amending § 5004] shall take effect ten days after [June 15, 1981]. In actions in which interest is to be computed from a date prior to such effective date, interest shall be computed at the rate of six per centum per annum until such date and nine per centum per annum thereafter." *See* N.Y.Civ.Prac.Law § 5004 (McKinney Supp. 1984) (legislative history notes).

Thus, interest should be computed at 6% per annum from May 4, 1976 until June 25, 1981, and at 9% per annum from June 26, 1981 until the date final judgment is entered.[7]

Plaintiff also premises his motion for prejudgment interest on the Commodity Exchange Act claim. It is well established that in the absence of a statutory directive or controlling case law, the grant or denial of prejudgment interest on claims arising under federal law is within the sound discretion of the district court. *E.g.*, *Lodges 743 and 1746 v. United Aircraft*

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7 The date of entry of final judgment shall be determined as set forth in footnote 9.

Corp., 534 F.2d 422, 446 (2d Cir.), *cert. denied*, 429 U.S. 825, 97 S. Ct. 79, 50 L. Ed.2d 87 (1976); *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-92 (2d Cir.), *cert. denied sub nom. Muscat v. Norte & Co.*, 397 U.S. 989, 90 S. Ct. 1121, 25 L. Ed.2d 396 (1970). There appears to be no case specifically addressing the issue of prejudgment interest in private claims under the Commodity Exchange Act, and the statute and legislative history are silent. We see no sound reason, however, not to apply the general rule that the issue of prejudgment interest on federal claims is to be resolved within the sound discretion of the district court. The reasoning of the Seventh Circuit in *Myron v. Chicoine*, 678 F.2d 727, 733-34 (7th Cir. 1982), is instructive:

> Given the compensatory basis of awarding prejudgment interest and the remedial purposes of CFTC [Commodity Futures Trading Commission] reparation proceedings, we have no doubt that the Commission may award such relief in appropriate cases. Nevertheless, the decision to award prejudgment interest rests in the sound discretion of the adjudicatory tribunal and involves a balancing of the equities between the parties under the circumstances of the particular case.

In exercising its discretion, the court must bear in mind that "an award of prejudgment interest is in the first instance, compensatory," and, secondly, is governed by fundamental considerations of fairness. *Rolf v. Blyth, Eastman Dillon & Co.*, 637 F.2d 77, 87 (2d Cir. 1980). The compensatory rationale is especially applicable "in cases [such as this] involving investments because by entering into such a transaction, the investor has manifested his intention to utilize the funds for the production of income." *Myron v. Chicoine*, *supra*, 678 F.2d at 734.

Viewing the facts in light of these considerations, we find that an award of prejudgment interest on the Commodity Exchange Act claim is necessary fully to compensate plaintiff for the loss of the use of his money and that such interest is not inequitable under the circumstances. Plaintiff has been unable

to invest or otherwise use $460,000 for over seven years. This is a substantial sum. *See Rolf v. Blyth, Eastman Dillon & Co., supra*, 637 F.2d at 87; *see also, Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 191 (2d Cir.), *rev'd on other grounds*, 430 U.S. 1, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1975).

Furthermore, "there is no evidence of dilatory tactics on the part of the plaintiff." *Rolf v. Blyth, Eastman Dillon & Co., supra*, 637 F.2d at 87. Indeed, it appears that throughout the tortuous course of this litigation, plaintiff has made every effort to bring this case to trial. *Cf. Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d 426, 429 (2d Cir. 1962) (delays in admiralty suit due to difficulties on both sides in obtaining evidence). Nor is there evidence of wrongdoing by the plaintiff. *Lodges 743 and 1746 v. United Aircraft Corp., supra*, 534 F.2d at 447. Finally, defendants have made no showing of unfairness of an award of prejudgment interest. *See Rolf v. Blyth, Eastman Dillon & Co., supra*, 637 F.2d at 87.

As to the specific rate of interest, we may look to the law of New York as a suitable guide. *Collier v. Granger, supra*, 258 F. Supp. at 719. We find that the interest provisions of N.Y.Civ.Prac.Law §§ 5001, 5003, 5004, as applied to the state law claims, *supra*, reasonably and equitably compensate plaintiff for the loss of the use of his money.

Plaintiff also contends that prejudgment interest should be assessed on the basis of his federal antitrust claim. The general rule of discretion in awarding prejudgment interest on federal claims, however, is inapplicable to federal antitrust claims, at least in this circuit. *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 80 (2d Cir.), *rev'd on other grounds*, 409 U.S. 363, 93 S. Ct. 647, 34 L. Ed.2d 577 (1973); *Vandervelde v. Put & Call Brokers & Dealers Ass'n*, 344 F. Supp. 118, 157 (S.D.N.Y. 1972); *see also Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 638 F.2d 661, 663 (3d Cir. 1981); *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 987 (5th Cir. 1977); *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970); *Smith v. Pro-Football Inc.*, 528 F. Supp. 1266, 1275

(D.D.C.), *aff'd in part and rev'd in part on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978).[8]

Plaintiff cites two cases in this district which apparently support his request for prejudgment interest on the antitrust claim. The first case, *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 1980-81 CCH Trade Cases ¶ 63,806 at 78,315 (S.D.N.Y. 1981), neither cited nor considered the Second Circuit's holding in *Trans World Airlines, Inc., supra*. *Uniroyal, Inc. v. Jetco Auto Service, Inc., supra*, at 78,321 (citing without discussion only the district court's opinion in *Trans World Airlines, Inc. v. Hughes*, 308 F. Supp. 679, 696 (S.D.N.Y. 1969), which denied prejudgment interest).

In the second case relied upon by plaintiff, *Eiberger v. Sony Corp. of America*, 459 F. Supp. 1276, 1289 (S.D.N.Y.), *rev'd on other grounds*, 622 F.2d 1068 (2d Cir. 1980), the district court did not discuss the issue of prejudgment interest in federal antitrust claims, cited no authority in support of its award, and failed completely to consider the controlling rule of *Trans World Airlines, Inc.*

Thus, we do not find these cases persuasive and choose, as we must, to follow the rule laid down in *Trans World Airlines, Inc., supra*. In cases such as this, commenced prior to the enactment in 1980 of the Antitrust Improvements Act, Pub. L. No. 96-349, 94 Stat. 1156, prejudgment interest on federal antitrust claims is not allowed. *Accord Vendervelde v. Put & Call Brokers & Dealers Ass'n, supra*; *Smith v. Pro-Football, Inc., supra*.

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8 Before 1980, Section 4 of the Clayton Act, 15 U.S.C. § 15, was silent on the issue of prejudgment interest in private treble damage actions. In 1980, however, Congress enacted the Antitrust Improvements Act, Pub. L. No. 96-349, 94 Stat. 1156, which provides for the discretionary award of interest "on actual damages for the period beginning on the date of service of [the pleading] and ending on the date of judgment, or for any shorter period therein." 15 U.S.C. § 15 (1982), 15 U.S.C.A. § 15 (West Supp. 1984). However, this provision is applicable only "to actions commenced after the date of the enactment of this Act [September 12, 1980]." 15 U.S.C.A. § 15 (West Supp. 1984) (legislative history notes quoting Pub. L. No. 96-349, § 4(b)). Because the instant suit was filed before 1980, the interest provision of § 15 is inapplicable.

Accordingly:

(1) Defendants' motion for a new trial based on newly discovered evidence and for reargument of their earlier post-trial motions are denied in all respects.

(2) Defendants' motion to deduct plaintiff's settlement payments from the damage award is granted in the following respect: plaintiff's settlement payments shall be subtracted from the amount of the award after trebling.

(3) Plaintiff's motion for prejudgment interest is granted in the following respects: on the amount of $460,000 plaintiff shall receive interest at 6% per annum from May 4, 1976 until June 25, 1981, and at 9% per annum from June 26, 1981 until the date final judgment is entered. Plaintiff's motion for prejudgment interest is denied in all other respects.[9]

Settle judgment within ten (10) days.

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9 The parties have brought to our attention various clerical errors in the judgment entered by the Clerk on March 8, 1984. The parties may address these errors when they settle judgment, and will amend or vacate and reenter the corrected judgment. Fed. R. Civ. P. 60. The date of "final judgment" for the purposes of computing prejudgment interest shall be the date that a judgment in accordance with this opinion is entered.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 84-7328, 84-7770

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of July one thousand nine hundred and eighty-five.

Present: HON. WILFRED FEINBERG, Chief Judge
HON. WILLIAM H. TIMBERS,
HON. RICHARD J. CARDAMONE

Circuit Judges,

JOSEPH STROBL,

Plaintiff-Appellee,
Cross-Appellant,

—v.—

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON AND MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., BEN PRESSNER, PRESSNER TRADING CORP., JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT, a/k/a J.R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., SIMPLOT PRODUCTS COMPANY, INC., PETER J. TAGARES a/k/a PETER J. TAGGARES, P.J. TAGGARES COMPANY, C.L. OTTER, SIMTAG FARMS, KENNETH RAMM, A & B FARMS, INC., HUGH D. GLENN, GEARHEART FARMING, INC., ED MCKAY, HARVEY POLLAK, HENRY POLLAK, HENRY POLLAK, INC., HENRY A. POLLAK & COMPANY, INC., ROBERT REARDON a/k/a

BOBBY REARDON, F.J. REARDON, INC., ALEX SINCLAIR, SINCLAIR & COMPANY, STEPHEN SUNDHEIMER, CHARLES EDELSTEIN, JAMES LANDRY a/k/a JIM LANDRY and JERRY RAFFERTY, jointly and severally,

Defendants,

JOHN R. SIMPLOT, J.R. SIMPLOT CO., SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIM-TAG FARMS,

Defendants-Appellants Cross Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeals from the judgment of said District Court be and it hereby is be and they hereby are affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

Elaine B. Goldsmith
Clerk

Edward J. Guardaro

By: Edward J. Guardaro

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 Civ. 1834 (LFM)

JOSEPH STROBL,

Plaintiff,

—v.—

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON AND MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., BEN PRESSNER, PRESSNER TRADING CORP., JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT, a/k/a/ J.R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., SIMPLOT PRODUCTS COMPANY, INC., PETER J. TAGARES a/k/a PETER J. TAGGARES, P.J. TAGGARES COMPANY, C.L. OTTER, SIMTAG FARMS, KENNETH RAMM, A & B FARMS, INC., HUGH D. GLENN, GEARHEART FARMING, INC., ED MCKAY, HARVEY POLLAK, HENRY POLLAK, HENRY POLLAK, INC., HENRY A. POLLAK & COMPANY, INC., ROBERT REARDON a/k/a BOBBY REARDON, F.J. REARDON, INC., ALEX SINCLAIR, SINCLAIR & COMPANY, STEPHEN SONDHEIMER, CHARLES EDELSTEIN, JAMES LANDRY a/k/a JIM LANDRY and JERRY RAFFERTY, jointly and severally,

Defendants.

FINAL JUDGMENT

WHEREAS, the issues in the above entitled action were brought on for trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury on October 31, 1983, and at

the conclusion of the trial the jury returned a verdict on November 17, 1983 in favor of the plaintiff on each and every claim, in the amount of $460,000.00, as against defendants John R. Simplot, J.R. Simplot Company, SimTag Farms, Simplot Industries, Inc., P. J. Taggares Company and Peter J. Taggares, jointly and severally;

WHEREAS, pursuant to an opinion dated March 20, 1984, defendants' motions for judgment notwithstanding verdict or a new trial were denied in all respects, and a judgment in the sum of $460,000.00 against defendants John R. Simplot and Peter J. Taggares was entered on March 8, 1984;

WHEREAS, pursuant to an opinion dated July 11, 1984, (1) defendants' motions for a new trial based on newly discovered evidence and for reargument of their earlier post-trial motions were denied, (2) defendants' motion to deduct plaintiff's settlement proceeds was granted in part as to the Sherman Act and Clayton Act claim, after trebling of damages, and (3) plaintiff's motion for prejudgment interest was granted on the Commodity Exchange Act and New York common law fraud claims and denied on the Sherman Act and Clayton Act claim;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the March 8, 1984 judgment be corrected and modified so that the plaintiff have judgment from that date against the defendants John R. Simplot, J. R. Simplot Company, Simplot Industries, Inc., SimTag Farms, P. J. Taggares Company and Peter J. Taggares, jointly and severally, as follows:

1) On his claim under Section 1 of the Sherman Act, 15 U.S.C. Section 1 and Section 4 of the Clayton Act, 15 U.S.C. Section 15, treble damages in the total sum of $1,263,625.00, excluding prejudgment interest together with the cost of this suit, including a reasonable attorney's fee, to be determined by a separate order of this Court; or in the alternative,

2) On his claims under the Commodity Exchange Act, 7 U.S.C. Sections 6(a) and 13(b), in the total sum of $460,000.00

plus prejudgment interest at the rate of 6% per annum from May 4, 1976 until June 25, 1981 in the total sum of $160,845.74 and at the rate of 9% per annum from June 26, 1981 until March 8, 1984 in the total sum of $163,524.39 or in the alternative,

3) On his claim under New York common law fraud, $460,000.00 plus prejudgment interest at the rate of 6% per annum from May 4, 1976 until June 25, 1981 in the total sum of $160,845.74 and at the rate of 9% per annum from June 26, 1981 until March 8, 1984 in the total sum of $163,524.39;

AND IT IS FURTHER HEREBY ORDERED ADJUDGED AND DECREED:

That Plaintiff is entitled to recovery on any one, but only one, of the foregoing claims described in items 1) - 3) above his sole election.

Dated: New York, New York
August 8, 1984.

Lloyd F. MacMahon

Lloyd F. MacMahon
United States District Judge

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 8/13/84

COMMODITY EXCHANGE ACT

7 U.S.C. § 2

Definitions

For the purposes of this chapter "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in section 13-1 of this title, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in: *Provided*, That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title: *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such

laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade. The term "future delivery" as used in this chapter, shall not include any sale of any cash commodity for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling commodity or receiving the same for sale on consignment. The words "interstate commerce" shall be construed to mean commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof, or within any Territory or possession, or the District of Columbia. The words "cooperative association of producers" shall mean any cooperative association, corporate or otherwise, not less than 75 per centum in good faith owned or controlled, directly or indirectly, by producers of agricultural products and otherwise complying with sections 291 and 292 of this title, including any organization acting for a group of such associations and owned or controlled by such associations, provided that business done for or with the United States of America, or any agency thereof, shall not be considered either member or nonmember business in determining the compliance of any such association with said sections. The words "member of a contract market" shall mean and include individuals, associations, partnerships, corporations, and trusts owning or holding membership in, or admitted to membership representation on, a contract market or given members' trading privileges thereon. The words "futures commission merchant" shall mean and include individuals, associations, partnerships, cor-

porations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom. The words "floor broker" shall mean any person who, in or surrounding any "pit", "ring", "post", or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person any commodity for future delivery on or subject to the rules of any contract market. The words "the Commission" shall mean the Commodity Futures Trading Commission established under section 4a of this title. The term "commodity trading advisor" shall mean any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order: *Provided*, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession. The term "commodity pool operator" shall mean any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or

through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

7 U.S.C. § 6a

Excessive speculation as burden on interstate commerce; trading or position limits; control; hedging transactions; application of section

(1) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or different trading limits for buying and selling operations, or

different limits for the purposes of paragraphs (2)(A) and (B) of this section, or from exempting transactions normally known to the trade as "spreads" or "straddles" or "arbitrage" or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word "arbitrage" in domestic markets shall be defined to mean the same as a "spread" or "straddle". The Commission is authorized to define the term "international arbitrage".

(2) The commission shall, in such order, fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person—

(A) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the commission in such order for or with respect to such commodity; or

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity: *Provided*, That such position limit shall not apply to a position acquired in good faith prior to the effective date of such order.

(3) No order issued under paragraph (1) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions as such terms shall be defined by the Commission within one hundred and eighty days after the effective date of the Commodity Futures Trading Commission Act of 1974 by order consistent with the purposes of this chapter.

(4) This section shall apply to a person that is registered as a futures commission merchant or as floor broker under author-

ity of this chapter only to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. This section shall not apply to transactions made by, or on behalf of, or at the direction of, the United States, or a duly authorized agency thereof.

7 U.S.C. § 13b

Manipulations or other violations; cease and desist orders against persons other than contract markets; punishment; misdemeanor or felony; separate offenses

If any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing, and subject to appeal as in other cases provided for in section 9 of this title, make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100,000, or imprisoned for not less than six months nor more than one year, or both, except that if such failure or refusal to obey or comply with such order involves any offense within paragraph (a) or (b) of section 13 of this title, such person shall be guilty of a felony and, upon conviction thereof, shall be subject to the penalties of said paragraph (a) or (b): *Provided*, That any such cease and desist order against any respondent in any case of manipulation of, or attempt to manipulate, the price of any commodity shall be issued only in conjunction with an order issued against such respondent under section 9 of this title. Each day during which such failure or refusal to obey or comply with such order continues shall be deemed a separate offense.

7 U.S.C. § 19

Antitrust laws; anticompetitive means

The Commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this chapter, as well as the policies and purposes of this chapter, in issuing any order or adopting any Commission rule or regulation, or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 21 of this title.

SHERMAN ACT

15 U.S.C. § 1

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

CLAYTON ACT

15 U.S.C. § 15

Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMENDED COMPLAINT

76 Civ. 1834 (L.F.M.)

JOSEPH STROBL,

Plaintiff,

vs.

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON AND MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., BEN PRESSNER, PRESSNER TRADING CORP., JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT a/k/a/ J.R. SIMPLOT, J.R. SIMPLOT COMPA. Y, SIMPLOT INDUSTRIES, INC., SIMPLOT PRODUCTS COMPANY, INC., PETER J. TAGARES a/k/a/ PETER J. TAGGARES, P.J. TAGGERES COMPANY[1], C.L. OTTER, SIMTAG FARMS, KENNETH RAMM, A & B FARMS, INC., HUGH D. GLENN, GEARHEART FARMING, INC., ED MCKAY, HARVEY POLLACK, HENRY POLLAK, HENRY POLLAK, INC., HENRY A. POLLAK & COMPANY, INC., ROBERT REARDON a/k/a BOBBY REARDON, F.J. REARDON, INC., ALEX SINCLAIR, SINCLAIR & COMPANY, STEPHEN SONDHEIMER, CHARLES EDELSTEIN, JAMES LANDRY a/k/a/ JIM LANDRY, and JERRY RAFFERTY, jointly and severally,

Defendants.

1 All the errors found herein are in the original Amended Complaint.

COMPLAINT

NOW COMES the above named Plaintiff, JOSEPH STROBL, by and through his attorneys, LOVELL & WESTLOW, CHARFOOS, CHRISTENSEN, GILBERT & ARCHER, P.C., and LEONARD TOBOROFF, P.C., and for his claim against the Defendants, jointly and severally, NEW YORK MERCANTILE EXCHANGE (hereinafter Defendant Exchange), JOHN RICHARD SIMPLOT a/k/a/ JACK RICHARD SIMPLOT a/k/a J. R. SIMPLOT, J. R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., SIMPLOT PRODUCTS COMPANY, INC., PETER J. TAGARES a/k/a/ PETER J. TAGGARES, P. J. TAGGARES COMPANY, SIMTAG FARMS, C. L. OTTER (hereinafter Defendant Traders), CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON AND MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., PRESSNER TRADING CORP., KENNETH RAMM, A & B FARMS, INC., HUGH V. GLENN, GEARHEART FARMING, INC., ED MCKAY, HARVEY POLLAK, HENRY POLLAK, HENRY POLLAK, INC., HENRY A. POLLAK & COMPANY, INC., ROBERT REARDON a/k/a/ BOBBY REARDON, F. J. REARDON, INC., ALEX SINCLAIR, SINCLAIR & COMPANY, STEPHEN SONDHEIMER, CHARLES EDELSTEIN, JAMES LANDRY a/k/a/ JIM LANDRY AND JERRY RAFFERTY, (hereinafter Defendant Brokers), alleges and states as follows:

COUNT I

1. That this action is brought on behalf of the Plaintiff, JOSEPH STROBL, to receover damages and the costs of suit, including reasonable attorney fees and interest, under Section 1 of the Sherman Antitrust Act, 26 Stat. 209 (1890) 15 U.S.C.A. Sec. 1 (1974), as Amended; Section 2 of the Sherman Antitrust Act, 26 Stat. 209 (1890) 15 U.S.C.A. Sec. 2 (1974), as Amended; and Section 3 of the Sherman Antitrust Act, 26 Stat. 209 (1890) 15 U.S.C.A. Sec. 3 (1974), as Amended, Section 13 of the Clayton Antitrust Act, 38 Stat. 730 (1914) 15 U.S.C.A. Sec. 13 (1914) as Amended; Section 9 of the Com-

modities Exchange Act, 42 Stat. 1003, (1922) as Amended, 7 U.S.C.A. Sec. 13, 13a, 13b, 13c (1974), of the Commodities Exchange Act, 49 Stat. 1493 (1922), as Amended; 7 U.S.C.A. (1914), the rules and regulations promulgated by the Commodity Futures Trading Commission pursuant to the Act, the By-Laws, Rules and Regulations of the New York Mercantile Exchange and the Common Law.

2. That this Honorable Court has jurisdiction pursuant to Section 4 of the Clayton Act, 15 U.S.C.A., Sec. 15; 28 U.S.C.A. Sec. 1337, the provisions of the Act and the doctrine of pendent jurisdiction.

3. That Plaintiff, JOSEPH STRÖBL, is an individual, and is a resident of the City of Detroit, State of Michigan.

4. That the Defendant, NEW YORK MERCANTILE EXCHANGE (hereinafter the "Exchange") is a New York Corporation with its principal place of business in New York City, New York. Defendant Exchange is a board of trade constituted a contract market and registered with the Commodity Futures Trading Commission under the terms of the Commodity Exchange Act, 42 Stat. 998 (1922), as Amended; 7 U.S.C.A. Sec. 1, *et seq.* (1974), herein referred to as the "Act".

5. That Defendant, CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., (hereinafter "Clayton"), is a Missouri Corporation with its principal place of business in St. Louis, Missouri. Defendant CLAYTON, is a "member of a contract market" and a "futures commission merchant" as those terms are defined in the "Act", 7 U.S.C.A., Sec. 2. Said Defendant is a clearing member or futures commission merchant of Defendant, NEW YORK MERCANTILE EXCHANGE, is registered by the Commodity Futures Trading Commission, created under the terms of the Commodities Exchange Act and is found and transacts business within the Southern District of New York.

6. That Defendant, HEINOLD COMMODITIES, INC., (hereinafter "Heinold") is a New York Corporation with its princi-

pal place of business in Chicago, Illinois. Defendant, HEINOLD, is a "member of a contract market" and a "future commission merchant" as those terms are defined in the "Act", 7 U.S.C.A. Sec. 2. Defendant, HEINOLD, is a clearing member or futures commission merchant of Defendant, NEW YORK MERCANTILE EXCHANGE, is registered by the Commodity Futures Trading Commission, created under the terms of the Commodities Exchange Act, and is found and transacts business within the Southern District of New York.

7. That Defendant, THOMSON and MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., (hereinafter "Thomson & McKinnon), is a New York Corporation with its principal place of business in New York City, New York. Defendant, THOMSON & MCKINNON, is a "member of a contract market" and a "future commission merchant" as those terms are defined in the "Act", 7 U.S.C.A., Sec. 2. Said Defendant is a clearing member or futures commission merchant of Defendant, NEW YORK MERCANTILE EXCHANGE, is registered by the Commodity Futures Trading Commission, created under the terms of the Commodities Exchange Act, and is found and transacts business within the Southern District of New York.

8. That Defendant, BEN PRESSNER, is an individual and principal in Defendant, PRESSNER TRADING CORPORATION, trading on behalf of himself or a general or limited partnership trading through agents within the Southern District of New York.

9. That Defendant, PRESSNER TRADING CORPORATION, Is a corporation which is a clearing member or futures commission merchant of the defendant, NEW YORK MERC NTILE EXCHANGE, is registered by the Commodity Futures Trading Commission, created under the terms of the Commodities Exchange Act and is found and transacts bussiness within the Southern District of New York.

10. That Defendant, JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT a/k/a/ J. R. SIMPLOT, is an individual and a citizen and resident of the State of Idaho. Said Defendnt

SIMPLOT is the controlling shareholder and Chief Executive Officer of Defendants, J. R. SIMPLOT COMPANY AND SIMPLOT INDUSTRIES, INC. Said Defendant is an individual or general partner trading on behalf of himself or a general or limited partnership, trading through agents within the Southern District of New York.

11. That Defendant, J. R. SIMPLOT COMPANY, is a corporation and/or business entity and/or sole proprietorship owned and controlled by Defendant, JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT a/k/a/ J. R. SIMPLOT, and has its principal place of business in the State of Idaho. Said Company is an entity trading through agents within the Southern District of New York.

12. That Defendant, SIMPLOT PRODUCTS COMPANY, INC., is a corporation or business entity trading through agents within the Southern District of New York.

13. That Defendant, SIMPLOT INDUSTRIES, INC., is a corporation and/or business entity formed under the laws of a state other than New Jersey, with its principal place of business in Idaho, trading through agents within the Southern District of New York.

14. That Defendant, PETER J. TAGARES a/k/a PETER J. TAGGARES, is an individual and is a citizen and resident of the State of Washington and is an individual or general partner trading on behalf of himself or a general or limited partnership and trading through agents within the Southern District of New York.

15. That Defendant, P. J. TAGGARES COMPANY, is a corporation or business entity trading through agents within the Southern District of New York.

16. That Defendant, C.L. OTTER, is an individual and citizen and resident of the State of Idaho and is the vice-president of Defendant, SIMPLOT INDUSTRIES, INC., and is the son-in-law of Defendant, JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT a/k/a J. R. SIMPLOT, and is an

individual or general partner trading on behalf of himself or a general partner trading on behalf of himself or a general or limited partnership or corporation, trading through agents within the Southern District of New York.

17. That Defendant, SIMTAG FARMS, is a joint venture between Defendant, JOHN RICHARD SIMPLOT a/k/a JACK RICHARD SIMPLOT a/k/a J. R. SIMPLOT, and PETER J. TAGARES a/k/a PETER J. TAGGARES, trading through agents within the Southern District of New York.

18. That Defendant, KENNETH RAMM, is an individual or general partner, trading on behalf of himself or a general or limited partnership, trading through agents within the Southern District of New York.

19. That Defendant, A & B FARMS, INC., is a corporation trading through agents in the Southern District of New York.

20. That Defendant, HUGH D. GLENN, is an individual or general partner trading on behalf of himself or a general or limited partnership trading through agents within the Southern District of New York.

21. That Defendant, GEARHEART FARMING, INC., is a corporation trading through agents in the Southern District of New York.

22. That Defendant ED MCKAY, is an individual or general partner trading on behalf of himself or a general or limited partnership trading through agents within the Southern District of New York.

23. That Defendant, HARVEY POLLAK, is an individual or partner either trading on his own behalf or on behalf of a general or limited partnership and is believed to be a futures commission merchant of Defendant, NEW YORK MERCANTILE EXCHANGE, is believed to be registered by the Commodity Futures Trading Commission, created under the terms of the Commodities Exchange Act, is found and transacts business within the Southern District of New York and trades through agents within the Southern District of New York.

24. That Defendant, HENRY POLLAK, is an individual or partner either trading on his own behalf or on behalf of a general or limited partnership and is believed to be a futures commission merchant of Defendant, NEW YORK MERCANTILE EXCHANGE, is believed to be registered by the Commodity Futures Trading Commission, created under the terms of the Commodities Exchange Act, is found and transacts business within the Southern District of New York and trades through agents within the Southern District of New York.

29. That Defendant, SINCLAIR & COMPANY, is a corporation trading through agents in the Southern District of New York.

30. That Defendant, STEPHEN SONDHEIMER, is an individual and principal in Defendant, PRESSNER TRADING CORPORATION, trading on behalf of himself or a general or limited partnership trading through agents within the Southern District of New York.

31. That Defendant, CHARLES EDELSTEIN, is an individual or general partner trading on behalf of himself or a general or limited partnership trading through agents within the Southern District of New York.

32. That Defendant, JAMES LANDRY a/k/a JIM LANDRY, is an individual or general partner trading on behalf of himself or a general or limited partnership trading through agents within the Southern District of New York.

33. That Defendant, JERRY RAFFERTY, is an individual or general partner trading on behalf of himself or a general or limited partnership trading through agents within the Southern District of New York.

34. That this action is being brought by the Plaintiff, JOSEPH STROBL, against the above named Defendants, jointly and severally, concerning the trading of April, 1976 and May, 1976 Maine potato futures contracts under the Futures Marketplace conducted by the defendant, NEW YORK MERCANTILE EXCHANGE, between theffirsttdateNuponOwhich such, futures

were traded and the closePofLtradingMinNsuchNfutures whichrwasoon or about April 7, 1976mandeMayo7,f1976, srespectively erchants of

35. That MaineAgrown potatoes, areearvarietyeofby the Solanum Tuberosum (IrishgPotatoes)oa,"commodity"das thatt-term is defined in the Actcandgarecregularlyetraded and shippedtin interstate commerce. Southern District of New York.

36. That contracts,forBfutureAdeliveries ofBMaine potatoes "commonly knownlasrpotatoefutures" haveibeennandsaren regularly bought andosoldgineinterstateicommercen andhon the is Exchange, subject touthe Act,itheoCharter, nBy-LawsfandarulesEof the Exchange, and theNrulessandl regulations promulgatedbbytthe Commission. rading Commission, created under the terms

37. That thesenpotato,futuresnarenstandardized as each contract calls fortaedeliveryiof affixedYquantitytofdes 50,000 pounds, somtimeshreferredrtoDastaicarload,wofoak. specified quality ofeMainenpotatoes atAaDpredeterminedalocation.

38. That pricesearenquotedeinodollarseperocwt sorn cents per pound. nt, NEW YORK MERCANTILE EXCHANGE, is

39. That theotimesFofudeliveryiareCalsosstandardizedd and that the potatoesearemdeliverablecduringAatdesignatedotime established by the regulationstof thetDefendantrExchange. w York.

40. That whennonetbuysEorSsellsIApril or Mayipotato futures, one enterseaDcontract,toIbuyAor sellMpotatoesading on deliverable in April orgMayrrespectively, atranpricepagreeding upon on the date ofithehexecutionnofitheicontract. York.

41. That prices quoted on the Defendant Exchange are supposed to represent, and usually represent, genuine transactions as the quoted price rises or falls, the buyers and sellers of contracts having unrealized profits or losses on their respective contract positions.

42. That the full purchase price is not payable until the contract expires and delivery made in accordance with the Defendant Exchange requirements. Parties to the contract, on both the long and short side, are required to post with their brokers a cash deposit, a margin (approximately ten percent of the total price) when a trade is initiated.

43. That Plaintiff, JOSEPH STROBL, purchased long positions in April, 1976 and May, 1976 potato futures contracts and liquidated contracts prior to the end of trading.

44. That actual delivery or receipt or delivery of April 1976 Maine potato futures which were not closed out or offset as of April 7, 1976 was required to be made on or before April 25, 1976 and that actual delivery or receipt of delivery of May, 1976 Maine potato futures which were not closed out or offset as of May 7, 1976 was required to be made on or before May 25, 1976.

45. That plaintiff, JOSEPH STROBL, bought approximately 221 contracts of April and May 1976 Main potato futures in a net long position.

46. That various other persons sold contracts of April and May 1976 Maine potato futures, holding net short positions.

47. That the net short positions held by said defendants, directly and indirectly, constituted a substantial portion of all outstanding short positions.

48. That defendants, jointly and severally, owned an inadequate supply of potatoes to meet with the specifications of the May 1976 potato futures contracts and thereby were in a "naked short" position.

49. That in order to enhance their financial positions, said Defendants, jointly and severally, and other persons presently unknown to the Plaintiff but well known to the defendants, intentionally engaged in a course of conduct to manipulate the market price to create an artifically low price for April and May 1976 Maine potato futures contracts, which price would

not reflect basic natural market forces, contrary to and in violation of the Act, the Rules and REgulations of the Commodities Future Trading Commission, 17 C.F.R. Sec. 0.0 *et seq.* and the By-Laws, Rules and Regulations of the Defendant Exchange.

50. That in furtherance of their intention to manipulate the market price of April and May 1976 Maine potato futures contracts, said Defendants, jointly and severally, and other persons, unknown to the Plaintiff, but well known to the Defendants, made short sales of April and May 1976 Maine potato futures contracts, with an intent to reduce the price and that they exceeded the limits on the maximum net short positions in Maine potato futures contracts, which any persons may directly or indirectly hold or controls as fixed by regulation of the Commodities Future Trading Commission.

51. That these short sales were made by Defendant Traders and/or in the accounts of the Defendants and/or in the accounts of their nominees and/or in the accounts of persons unknown to the Plaintiff but well known to the defendants, in their accounts with Defendant Brokers, while other defendants were floor traders who were intimately involved in these transactions.

52. That in order to depress the price of May 1976 Maine potato futures contracts, said Defendants, each of them and/or all of them, engaged in the following manipulative acts to reduce the price of May 1976 Maine potato futures contracts, which acts are as follows, but not limited to:

a) That on or about April 14, 1976 they sent one or more roller cars of potatoes moving east, knowing that they did not have any customer or buyer for those potatoes. That roller cars are railroad carloads of potatoes that are shipped from market to market and offered for immediate sale at the going-price (i.e. the price for immediate delivery). That normally shippers dispatch carloads only when they have buyers for them.

b) That on or about April 16, 1976, said Defendants and other persons unknown to the Plaintiff but well known to the Defendants, entered into an undertaking and agreement to sell May 1976 Maine potato futures contracts into the market at any price in order to drive the market down.

c) That as early as April, 1976, said Defendants and other persons unknown to the Plaintiff but well known to the Defendants, knew or should have known that there was an insufficient number of Maine grown potatoes available in the United States or elsewhere to permit them to make delivery on or before May 25, 1976 of such potatoes to satisfy all of their open short positions. That, nonetheless, prior to and on the final day of trading, May 7, 1976, said Defendants and other persons unknown to the Plaintiff but well known to the Defendants, entered into an understanding and agreement pursuant to which they manipulated the market by was sales and other means.

d) That after the close of trading on May 7, 1976, there were approximately 1,900 open short positions. That said Defendants and other persons unknown to the Plaintiff but well known to the Defendants acknowledged that they could not make delivery pursuant to their open interest, and as of May 25, 1976, defaulted on at least 997 carloads of Maine potatoes.

e) That said Defendants and other persons unknown to the Plaintiff and well known to the defendants, delivered for transmission through the mails and in interstate commerce by telephone and other means of communication, false, misleading and knowingly inaccurate market information concerning Maine potatoes.

f) That said Defendants and other persons unknown to the Plaintiff and well known to the Defendants, also withheld certain information known to them that should have been made known to the public.

53. That the conduct of said Defendants, jointly and severally, and other persons unknown to the Plaintiff and well known to the Defendants, was intended to and did artificially lower the price of April and May 1976 Maine potato futures contracts during the period through May 7, 1976. That some of the overt acts of the Defendants, jointly and severally, and other persons unknown to the Plaintiff and well known to the Defendants, individually or through their authorized agents, acting within the scope of their authority, known at this time to Plaintiff upon information and belief, are set forth as follows:

a) Defendant Traders, Defendant Brokers, Defendant Floor Traers and their related entities attempted to achieve and did achieve, by the exercise of market power, a monopoly position on the short side of the market.

b) Defendant Traders, Defendant Brokers, and Defendant Floor Trders, attempted to achieve and did achieve a monopoly position as to the selling positions, (short contracts) of futures contracts for April and May, 1976 Maine potatoes by sale and purchase of large numbers of futures contracts upon the Defendant Exchange.

c) Defendant Exchange and Defendant Brokers and Defendant Floor Trders acquiesced in such monopolization, and in the case of Defendant Brokers and Defendant Floor Traers, the named Defendant Brokers and Defendant Floor Traers aided and assisted the monoplization in violation in their legal duties to Defendant Exchange and under the laws governing their conduct of business.

d) Defendant Traders, Defendant Brokers and Defendant Floor Traders and agents and employees of Defendant Exchange with specific knowledge of the unavailability of April and May 1976 Maine potatoes in sufficient quantities to justify their actions, continued by concerted effort to trade April and May 1976 potato futures contracts achieving a monopoly short position.

e) That during the same period Defendant Traders in concert with other Defendants and other persons unknown to the Plaintiff but well known to the Defendants, depressed the New York cash market of potatoes by shipping unsold potatoes, i.e. roller cars, in large quantities to market for immediate sale.

f) Defendant Trders acting in concert with the Defendant Brokers and Defendant Floor Trders and with the acquiescene and knowledge of agents of the defendant Exchange, failed to set off short futures contracts for May 1976 Maine potato futures contracts against long contracts to buy such commodities held by the Plaintiff, despite the fact that Defendant Traders, Defendant Brokers and Defendant Floor Trders had actual and specific knowledge that no Maine potatoes were available to fulfill such contracts and the fact that such failure to purchase ofsetting contracts was an intentional violation of the rules of the Defendant Exchange.

g) Defendant Traders, Defendant Brokers and Defendant Floor Traders knowingly conspired by telephone and otherwise and did accomplish the object of their conspiracy.

h) That Defendant Traders, Defendant Brokers, Defendant Floor Trders and the defendant Exchange intentionally and in concert violated the rules and regulations of the defendant, NEW YORK MERCANTILE EXCHANGE, by refusing to enter or force the entry of liquidating orders to purchase long contrcts held by the Plaintiff and others, when it was widely known that Defendant Traders were not in a position to fulfill the contractual obligations to deliver according to the terms of the maturing contracts, each for 50,000 pounds of Maine potatoes.

i) That Defendant Exchange despite warnings from agencies of the United States Government as to the un-

availability of Maine potatoes to fulfill futures contracts and as to artificial prices in the cash and futures market for such potatoes, knowingly and intentionally, through its officers, membes, agents and employees, permitted the default, deception, monopolization and injury resulting therefrom.

j) That despite the known artificial price structure existing in both the cash and futures contract market for April and May 1976 Maine potato futures contracts, Defendant Exchange did nothing to regulate or curtail the improper and unlawful acts of the other Defendants, jointly and severally.

54. That as a result of the aforementioned wrongful acts of the Defendants, jointly and severally, Plaintiff, JOSESPH STROBL, has been damaged in the amount of $462,080.

WHEREFORE, Plaintiff, JOSEPH STROBL, demands judgment in his favor and against the Defendants, jointly and severally, for damages claimed, together with the costs of suit, including reasonable attorney fees, together with interest.

COUNT II

55. Plaintiff, JOSEPH STROBL, incorporates by reference each and every allegation contained in Count I of this Complaint as though fully set forth herein word by word and paragarph by paragraph.

56. That Defendants, jointly and severally, contracted, combined and conspired among themselves and among other persons or entities presently unknown to the Plaintiff but well known to the Defendants, in restraint of trade or commerce among the several states and the District of Columbia in connection with a commodity described as April and May 1976 Maine potato futures contracts as traded through the Defendant Exchange.

57. That the aforesaid contracts, combination and conspiracy was in violation of Sections 1 and 3 of the Sherman Antitrust Act, and the Common Law.

58. That as a result of said unlawful acts, Plaintiff, JOSEPH STROBL, has been damaged in the amount of $462,080.

59. That as a result of said unlawful acts, Plaintiff, JOSEPH STROBL, is entitled to recover threefold the damages sustained by him, together with the costs of suit, including reasonable attorneys fees, together with interest.

WHEREFORE, Plaintiff, JOSEPH STROBL, demands judgment in his favor and against the Defendants, jointly and severally, for damages claimed, together with the costs of suit, including reasonable attorney fees, together with interest.

COUNT III

60. Plaintiff, JOSEPH STROBL, incorporates by reference each and every allegation contained in Counts I and II of this Complaint as though fully set forth herein word by word and paragraph by paragraph.

61. That the defendants, jointly and severally, monopolized or attempted to monopolize and combined or conspired among themselves and among other persons and entities presently unknown to the plaintiff but well known to the defendants, to monopolize a part of the trade or commerce among several states of the United States or the District of Columbia, to wit: the interstate trading of April and May 1976 Maine potato futures contracts.

62. That the aforesaid monopolization or attempted monopolization, combination or conspiracy was in violation of Section 2 of the Sherman Antitrust Act and the Common Law.

63. That as a result of said unlawful acts, Plaintiff, JOSEPH STROBL, has been damaged in the amount of $462,080.

64. That as a result of said unlawful acts, Plaintiff, JOSEPH STROBL, is entitled to recover threefold the damages sustained by him together with the costs of suit, including reasonable attorney fees, together with interest.

WHEREFORE, Plaintiff, JOSEPH STROBL, demands judgment in his favor and against Defendants, jointly and severally, for the damages sustained, together with the costs of suit, including reasonable attorneys fees, together with interest.

COUNT IV

65. Plaintiff, JOSEPH STROBL, incorporates by reference each and every allegation contained in Counts I, II and II of this Complaint, as though fully set forth herein word by word and paragraph by paragraph.

66. That Defendants, jointly and severally, manipulated or attempted to manipulate the price of a commodity in interstate commerce by fraud, deception and use of monopoly power; the commodity being April and May 1976 Maine potato futures contracts, sold for future delivery on Defendant Exchange.

67. That Defendants, jointly and severally, cornered or attempted to corner and monopolize the selling position of a commodity in interstate commerce, such commodity being April and May 1976 Maine potato futures contracts, sold for future delivery on the Defendent Exchange.

68. That the Defendants, jointly and severally, knowlingly delivered or caused to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless or other means of communication, false or misleading or knowingly inaccurate reports concerning crops or market information or conditions that affected or tended to affect the price of the aforesaid commodity in interstate commerce, including, but not limited to, information as to the ability of potatoes to cover the futures contracts sold by Defendant

Traders through Defendant Brokers and Defendant Floor Traders, under the supervision of the Defendant Exchange.

69. That the aforesaid actions were in violation of Section 9 of the Commodities Exchange Act, as amended, 7 U.S.C.A. § 13, 1974, and Section 5 of the Commodities Exchange Act, as amended, 7 U.S.C.A. 6 *et seq.* 1974.

70. That as a result of said unlawful acts, Plaintiff, JOSEPH STROBL, has been damaged in the amount of $462,080.

WHEREFORE, Plaintiff, JOSEPH STROBL, demands judgment in his favor and against Defendants, jointly and severally, for the damages sustained, together with the costs of suit, including reasonable attorneys fees together with interest.

COUNT V

71. Defendant, JOSEPH STROBL, incorporates by reference each and every allegation contained in Counts I, II, III, and IV of this Complaint as though fully set forth herein word by word and paragraph by paragraph.

72. That Defendant Exchange, Defendant Brokers of said Exchange, and Defendant Floor Traders negligently failed to maintain an orderly market for trading of an item of interstate commerce, to wit: to buy and sell April and May 1976 Maine potato futures contracts.

73. That said negligence was in violation and in disregard of the duties imposed upon said Defendant Exchange, Defendant Brokers and Defendant Floor Traders under the terms and provisions of the Commodities Exchange Act.

74. That as a result of said unlawful acts, Plaintiff, JOSEPH STROBL, has been damaged in the amount of $462,080.

WHEREFORE, Plaintiff, JOSEPH STROBL, demands judgment in his favor and against Defendants, jointly and severally, for the damages sustained, together with the costs of suit, including reasonable attorney fees together with interest.

COUNT VI

75. Defendant, JOSEPH STROBL, incorporates by reference each and every allegation contained in Counts I, II, III, IV, and V of this Complaint as though fully set forth herein word by word and paragraph by paragraph.

76. That Defendant Exchange, Defendant Brokers of said Exchange, and Defendant Floor Traders, through their officers, agents and employees, willfully and intentionally failed and refused to maintain an orderly market for trading of an item of interestate commerce, to wit: to buy and sell April and May 1976 Maine potato futures contracts.

77. That said conduct was in violation and willful and intentional disregard of the duties imposed upon said Defendants under the terms and provisions of the Commodities Exchange Act.

78. That as a result of said unlawful acts, Plaintiff, JOSEPH STROBL, has been damaged in the amount of $462,080.

79. That as a result of said willful and intentional conduct of the Defendants, jointly and severally, Plaintiff is entitled to recover for damages sustained by him, plus exemplary or punitive damages, together with costs of suit and reasonable attorney fees.

COUNT VII

80. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-79 with the same force and effect as if fully set forth hereat.

81. Between March and June 1976, Defendants J.R. Simplot, P.J. Taggares, J.R. Simplot Company, P.J. Taggares Company and Simtag Farms unlawfully, knowingly, intentionally and maliciously combined and conspired to fix and depress prices of Maine Potato Futures Contracts and Maine Potatoes and to destroy or severely harm the market for Maine futures contracts.

82. Such defendants fraudulently and maliciously concealed this unlawful conspiracy and their actions pursuant thereto from the Commodity Futures Trading Commission, the Exchange, and purchasers and sellers of such Maine Futures and Maine Potatoes between March and June, 1976. Such defendants intended by such concealment to induce and did induce such purchasers and sellers, including plaintiff, to purchase, hold and sell Maine Potato Futures Contracts in mistaken reliance on the material falsehood that the Maine Potato Futures markets and prices were fair and freely operating under the natural forces of true and lawful supply and demand.

83. As a direct and foreseeable result of such malicious, fraudulent, knowing and unlawful conduct by such Defendants, (a) prices of April and May 1976 Maine Potato Futures Contracts were unlawfully reduced, (b) Plaintiff Strobl held and liquidated (sold) long positions in Maine Futures at the unlawfully reduced prices and (c) plaintiff Strobl sustained damages in the amount of $462,080, and is entitled to punitive and exemplary damages.

WHEREFORE, Plaintiff JOSEPH STROBL, demands judgment in his favor and against Defendants, jointly and severally, for the damages sustained, together with the costs of suit, including reasonable attorneys fees, together with interest and, as to Court VII, punitive and exemplary damages.

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DEMAND FOR JURY TRIAL

NOW COMES the Plaintiff, JOSEPH STROBL, by and through his attorneys, LOVELL & WESTLOW, CHARFOOS, CHRISTENSEN, GILBERT & ARCHER, P.C. and LEONARD TOBOROFF, P.C., and hereby makes a demand for a trial by jury of the issues in this cause.

LOVELL & WESTLOW

BY:_____

Attorneys for Plaintiff
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Respectfully submitted,

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CURTIS, MALLET-PREVOST, COLT & MOSLE
SCOTT J. MCKAY WOLAS
PETER K. VIGELAND

Of Counsel

October 2, 1985

Supreme Court, U.S.
FILED
OCT 31 1985
JOSEPH F. SPANIOL
CLERK

No. 85-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Petitioners,

v.

JOSEPH STROBL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHRISTOPHER LOVELL
120 Broadway
New York, New York 10005
(212) 608-1900
Counsel for Respondent Joseph Strobl

LOVELL & STEWART
VICTOR E. STEWART
Of Counsel

October 31, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

The question raised by the petition does not present any conflict between circuit courts, was correctly decided by the Court below, and was originally raised as only an afterthought argument. It is as follows:

> 1. Does a vicious price-fixing conspiracy carried out in both the cash and futures contract portions of the potato market, by supposed competitors in the purchase of potatoes, and culminating in the largest default in the history of futures trading, somehow win immunity from the antitrust laws because it was so large that it also violated portions of the Commodity Exchange Act, where (a) Congress recognized the extreme danger of price-fixing conspiracies utilizing commodity futures markets by broadening in 1890 the scope of the Sherman Act in order to be sure to prohibit such conspiracies, (b) Congress again recognized such dangers in 1973-74 in the Commodity Exchange Act, wherein it expressly sought to retain such Sherman and Clayton Act prohibitions and court jurisdiction, and (c) no claim is or could be made that the classic price-fixing conspiracy was governmentally compelled.

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THE DECISION BELOW IS CORRECT BECAUSE COMMON SENSE, CONGRESS, AND THE COURTS ALL DISAGREE WITH DEFENDANTS' PROPOSITION THAT THERE IS NO DIFFERENCE FOR COMMODITY PRICE-FIXING PURPOSES BETWEEN THE COMMODITY FUTURES AND SECURITIES MARKETS 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-571

JOHN R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Petitioners,

v.

JOSEPH STROBL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Joseph Strobl requests that a writ of certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, which affirmed a final judgment of the United States District Court for the Southern District of New York which, in turn, upheld a jury verdict in its entirety. See Appendix.

Petitioners J.R. Simplot, P. J. Taggares *et al.* (sometimes hereinafter referred to as "defendants" or "petitioners") seek review of the Second Circuit's decision that their vicious price-fixing conspiracy which was so broad that it also violated various provisions of the Commodity Exchange Act (the "CEA") did not thereby become so large as to somehow win immunity from the prohibitions of the federal antitrust laws.

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

We accept petitioners' statements here except to note that Section 2(a)(1) of the CEA, 7 U.S.C. § 2 is also at issue; that the judgment was for $1,263,500.00 not $1,380,000 (*compare*, Appendix ("A") p. 53 with Petitioners' Brief ("PB") p. 2.); and that respondent disputes that this Court should grant the writ.

STATEMENT OF THE CASE

PETITIONERS' SOLE ARGUMENT HERE WAS AN AFTERTHOUGHT IN THE COURTS BELOW, WHICH THE DEFENDANTS NOW ATTEMPT TO SUPPORT BY RE-WRITING THE FACTS

1. *Underlying Facts.* Defendants belatedly raised an anti-trust argument below (see 2 *infra*). They have now re-cast the facts at issue in order to serve this afterthought argument and delay justice by the amount of time inherent in the certiorari process. Contrary to defendants' new version of the facts, however, this is not merely a "futures" market case; rather, it is a potato price-fixing conspiracy carried out in both the futures contract and cash portions of the potato market.

For example, the defendants were, and are, large supposed competitors in the purchase and processing of cash market potatoes. Their potato purchasing season is largely from March to May, the alleged conspiracy period here. During this time in 1976—and while defendants were purchasing over a billion pounds of potatoes—the supposed competitors had repeated intercommunications about potato prices and undertook numerous joint and individual actions in the cash and futures markets that were *per se* unlawful or highly unusual and which each had the effect of creating the appearance of a glut or oversupply of potatoes. See A. p. 26.

Such actions included, but were not limited to, the following: sending "roller cars" of unsold potatoes to eastern cash markets; selling contracts on futures markets to deliver (and representing to the potato markets the existence of) millions of pounds of Maine potatoes which defendants did not own; refusing to buy back those contracts on the futures market; and refusing to buy Maine potatoes on the cash markets in order to deliver in satisfaction of their futures contracts. By the latter step, for which defendants indemnified their brokers in order to gain their support, the supposed competitors perpetrated the largest default in the history of commodity futures trading in this country; it was highly publicized and destroyed the contract requirement on which futures depend for the theoretical vitality and validity of their trading prices: the delivery of the actual commodity. See A. pp. 27-30.

Thus, the conspiracy of the supposed competitors greatly profited their respective businesses (a) by fixing and depressing the prices they paid for potatoes that year and thereafter (*e.g.*, A. pp. 3-57), and (b) by discrediting and destroying the utility of the Maine potato futures contract as a beacon for fair prices in the cash potato markets (as defendants knew from their earlier default experience with Idaho potato futures, defaults destroy futures contracts).

Lower Court Proceedings. Plaintiff sued to recover, and was awarded, a sum equalling the difference between what he sold his Maine futures contracts for and what he would have sold them for in a fair market absent defendants' price-fixing.

Prior to trial, the antitrust argument here was never raised, although defendants' excellent counsel made numerous unsuccessful motions, *e.g.*:

> (a) to suppress mention of: (i) prior felony convictions of Simplot and Simplot Co. regarding false tax returns (denied), (ii) previous consent orders of Simplot and Taggares relating to May 1971, 1974, and 1976 potato futures contracts (granted in part, and denied in part),

and (iii) deposition testimony of a witness to the effect that Taggares encouraged him to join the conspiracy (denied) (the prior felony convictions and the admissions were NOT used by plaintiff at trial, but the deposition was used);

(b) to obtain partial summary judgment against proof of non-futures market damages on the antitrust claim of a plaintiff in a consolidated case (denied);

(c) to dismiss the Commodity Exchange Act claim (denied); and

(d) to preclude or permit use of miscellaneous other evidence, including an administrative decision in a proceeding in which Simplot had asserted his Fifth Amendment privilege against self-incrimination due to a pending criminal antitrust grand jury investigation, and Simplot and Taggares had accepted substantial penalties, including six and four year trading suspensions (denied).

Thus, despite years of preparation and despite making all these other unsuccessful motions prior to trial, defendants' excellent counsel apparently did not see their present antitrust jurisdiction issue as worthy of mention. Rather, the first time it was mentioned was after plaintiff had rested his case. And, again on the appeal, this belated argument was raised only as the third point in defendants' brief. It is now the sole ground on which defendants seek certiorari.

ARGUMENT

"Summary of Argument and Reasons For Denying Certiorari"

The writ should be denied for the following reasons.

There is no conflict between circuit courts. See Point III A *infra.*

There is no meaningful conflict between any court; and no conflict on the facts between the circuit court below and the cited district court opinion; moreover, the lone district court opinion which creates the meaningless conflict on the law not only has been repeatedly rejected by the decisions since but was based on obvious infirmities and an apparent failure to follow controlling law in its own circuit. See Point III B *infra.*

The statute at issue was later amended in material aspects not considered by the Court below. See Point III C *infra.*

Petitioners' real argument for certiorari is the asserted erroneousness of the decision below. However, the decision below was correctly decided; analyzing, point-by-point, the four points which petitioners asserted to be errors therein, serves only to demonstrate thoroughly that there was no error, see Points I-IV, and that defendants' petition here is, in view of their vicious price-fixing conspiracy and purposeful destruction of a market, an affront to the certiorari process.

POINT I

THE DECISION BELOW IS CORRECT BECAUSE COMMON SENSE, CONGRESS, AND THE COURTS ALL DISAGREE WITH DEFENDANTS' PROPOSITION THAT THERE IS NO DIFFERENCE FOR COMMODITY PRICE-FIXING PURPOSES BETWEEN THE COMMODITY FUTURES AND SECURITIES MARKETS

Defendants argue that the decision below was incorrect, that certiorari should be granted, and that their gargantuan price-fixing conspiracy here should be immunized from prosecution, under the Sherman Act, 15 U.S.C. § 1, for the following reason: supposedly there "is no reason why the federal antitrust laws should apply in one case [commodity futures markets] while not in the other [securities markets]." P.B. Point III, p. 15 (as all concede, fixing prices of securities is not, of itself, remediable under the Sherman Act). This would be a very weak point for certiorari, if even it were true.

However, it is false. And one need not be a farmer in order to understand that there are many reasons why the decision below was correct that commodity futures are different from securities insofar as commodity price fixing is concerned.

First, the most basic common sense indicates that the supposed competitors in the purchase of potatoes here could not have implemented, and need not have abused, the securities markets as an essential step in their potato price-fixing conspiracy to profit their processing operations; that the stock and options markets do not serve, while commodity futures markets do serve, as a price beacon for processors, producers, farmers, and users of commodities; and that securities are solely pieces of paper while commodity futures are contracts contemplating the delivery of, and becoming the actual commodity (unless a default occurs).

Taking only one snippet of testimony from the trial below is also instructive on this commodity price-discovery difference between securities and commodity futures:

> Q. You made reference in your last answer, Mr. deMerchant, to action on the Mercantile Exchange relating to trading the cash market. Does the Mercantile Exchange reported prices affect the cash market?
>
> A. Yes, they do. They lead the market up, and if it is in reverse, it leads the market or it will floor the market real fast.
>
> Our market moved quite fast with the Mercantile.
>
> Q. Are the Mercantile Exchange Maine potato futures contract prices reported in the state of Maine?
>
> A. In every potato business office, in every farm machinery office, in every fertilizer company office, anybody that's got anything to sell to the farmer, there was a ticker tape or there was a bulletin board or something. It was kept in front of everybody. Compare, A. pp 26-27.

The prices of securities were not and are not so reported. Thus, besides all the other differences between securities and commodity futures, there is one characteristic possessed by the latter but not by the former which of itself, merits different antitrust treatment: commodity futures have the power to set and affect, and do daily set and affect, cash commodity prices, but securities do not have this power. The "roller cars" and all the other cash market actions undertaken by defendants in their conspiracy at bar were effective for the defendants and damaging to fair prices and appearances; but the most effective and damaging of all was the futures market price-fixing because those polluted prices were instantaneously reported and read throughout the United States, and drove down potato prices all over; as the lower potato prices were reported in the terminal and shipping markets, they drove down prices, etc.

Moreover, Congress, in creating the Sherman Act in 1890, recognized these basic, common-sense commodity price-fixing

differences between our securities and commodities futures markets, and recognized that nowhere is a price-fixing conspiracy so dangerous as when it operates on a commodity futures market whose prices are nationally reported. For example, there is no mention of the securities markets made in the legislative deliberations culminating in the passage of the Sherman Act (despite the then-long existence of the securities markets). However, despite their relatively recent inception, commodity futures markets figured prominently in such deliberations.

Indeed, during the debates preceding the passage of the Sherman Act in 1890, Senator Ingalls of Kansas actually introduced an amendment to the Sherman Act that would have taxed out of existence those dealing in commodities futures contracts, in their entirety! 21 Cong. Rec. 2462-63 and 2648 (1890). See also *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 544 n. 40 (1944). Senator Sherman himself spoke in favor of the amendment, finding that it went to the very purpose of his proposed act! 21 Cong. Rec. 2652 (1890).

However, after four days of debate, the bill was sent to the Senate Committee on the Judiciary, of which Senator Ingalls was a member. That Committee then redrafted the bill to insert the broad and sweeping language which it contains today, and to delete the Ingalls amendment, with various members of the Committee drafting different sections; Senator Ingalls is reputed to have redrafted Section 8. 16 J.O. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATIONS Sec. 2.02[4] at 2-33 to 2-34 n. 116 (1984). The bill in its new, sweeping form was then submitted to a vote, fully supported by Senator Ingalls and the other proponents of the Ingalls amendment, and passed 52 to 1. 21 Cong. Rec. 3152-53 (1890).

Confirming that the language of Section 1 was broadened expressly in order to be sure to cover, *inter alia*, futures contracts, when the movement to tax futures out of existence

again gathered steam in 1892, Senator Hoar, a member of the Senate Judiciary Committee which rewrote the Sherman Act, confirmed that to the extent such futures and options activities were immoral or reprehensible, they were already actionable under the antitrust laws:

> MR. HOAR: I was about to say that my question relates to immoral contracts, contracts either in restraint of trade or establishing monopolies mingling with the honest commercial transactions some taint of immorality or wrongdoing or fraud . . . If it does come within that class it will be prohibited by the authority of the court as an obstruction against commerce."

24 Cong. Rec. 32 (1893).

From that time onwards, the Supreme Court regularly applied the antitrust laws to a wide variety of commodities markets. *See, e.g., Swift & Co. v. United States*, 196 U.S. 375, 394-400 (1905) (combination of fresh meat dealers fixing and rigging prices to induce cattlemen to send their livestock to the Chicago markets is within ambit of antitrust laws); *United States v. Patten*, 226 U.S. 525, 541-43 (1913) (conspiracy to run corner solely on New York Cotton Exchange was of itself an unreasonable restraint of trade and commerce among the States and would, therefore, inflict upon the public injuries which the Sherman Act was designed to prevent); *Chicago Bd. of Trade v. Olsen.*, 262 U.S. 1, 39-40 (1923) (while holding the Grain Futures Act constitutional, Court states that manipulations of futures which unduly depress prices of grain in interstate commerce fall under ambit of *Patten* and the antitrust laws, and that the Sherman Act's passage by itself appeared to have reduced or to be reducing dangerous tendencies in commodity futures).

Consistent with this solid Supreme Court precedent, federal courts have repeatedly applied federal antitrust laws to commodity futures transactions prior to the 1974 amendments to the CEA. *See, e.g., Miller v. New York Produce Exch.*, 550 F.2d 762, 766-68 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977)

(claims under CEA and Sherman Act entertained simultaneously but jury correct to dismiss charges for lack of evidence); In re *Ira Haupt & Co.*, 398 F.2d 607, 610 (2d Cir. 1968)(antitrust treble damages action against various commodities exchanges and brokers by brokerage firm in bankruptcy); *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 299-300 (2d Cir. 1965) (complaint against New York Produce Exchange and brokers under antitrust laws dismissed for lack of specificity with leave to file an amended complaint); *Cargill, Inc. v. Board of Trade*, 164 F.2d 820, 823 (7th Cir.), *cert. denied*, 333 U.S. 880 (1948) (deciding whether certain actions of the Exchange constituted price-fixing or illegal restraint of commerce under the antitrust laws); *Peto v. Howell*, 101 F.2d 353, 360 (7th Cir. 1938) (evidence showing that trader purchased corn futures in order to fix or increase prices, was substantial proof of price-fixing and a private suit for treble damages antitrust violation was permitted); *United States v. Sugar Inst.*, 15 F. Supp. 817, 896 (S.D.N.Y. 1934), *mod. on other grounds*, 297 U.S. 553 (1936) (market where members tacitly agree to maintain "public" prices on prior agreement, is violative of Section 1 of the Sherman Act).

Indeed, it could be said that the decision below was controlled by *United States v. Patten, supra*, and *Peto v. Howell, supra*. At the very least, these decisions show that there is no lack of harmony between the decision below and those of the Seventh Circuit or this Court.

Further, the United States Department of Justice and the Federal Trade Commission have long investigated commodity futures price disorders as being violative of the Sherman Act. *See New York Coffee and Sugar Exchange*, 3 CCH Trade Reg. Rep. Paragraph 25,364 (F.T.C. 1955); Federal Trade Commission, *Economic Report of the Investigation of Coffee Prices* (1954); Federal Trade Commission, *Report of Economic Effects of Grain Exchange Actions Affecting Futures Trading During the First Six Months of 1946* (1947); and Report of the

Federal Trade Commission on the Grain Trade, Volumes 1-7 (1922-1926), see particularly Volume 7, Effects of Futures Trading (1926).

Finally, legal scholarship has asserted that due to the price discovery and price-setting function of commodity futures, restraints of trade therein (such as the dangerous one at bar) are so deleterious that not only Sherman Act prosecution for retrospective award of damages, but also Commodity Exchange Act regulation for injunctive cessation thereof and rules prospectively to prevent same, are required. *See The Coffee Exchange Debacle: Highlighting The Need for Further Regulation of Futures Trading Through The Sherman Act And The Commodity Exchange Act*, 64 Yale L.J. 906, 915 (1955).

In sum, defendants are incorrect, the decision below was very correct and there are many good reasons why commodity futures are different from securities for purposes of Sherman Act commodity price-fixing conspiracies. Such reasons range from common sense, to the legislative history of the Sherman Act, to the treatment by the courts, government attorneys, and legal scholars. And they clearly demonstrate that the decision below is very correct; that defendants' glib suggestion of equal treatment of securities and commodity futures is clearly incorrect in this context; and that at the very least, this asserted reason clearly is no basis upon which certiorari should be granted.

POINT II

THE DECISION BELOW WAS CORRECT IN PERMITTING THE PRICE-FIXING CLAIM HERE, AND SUCH WAS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE 1973-74 AMENDMENTS TO THE COMMODITY EXCHANGE ACT

With the underlying facts and historical and legal treatment thus, placed in their proper perspective, we turn now to defendants main, or at least first, point for certiorari: the decision below is supposedly in conflict with (the legislative history of) the 1973-74 amendments to the Commodity Exchange Act wherein Congress (supposedly) repealed the antitrust laws with regard to price-fixing conspiracies as large as the one here. Again, however, the decision below was clearly correct and there is no conflict between it and the Commodity Exchange Act.

Defendants concede that Section 1 of the Sherman Act, by its terms, clearly prohibits their gargantuan price-fixing conspiracy with its tentacles in both the cash and futures portions of the potato markets. And the most basic common sense indicates that immunizing this classic price-fixing conspiracy from Sherman Act prosecution would be ludicrous.

But defendants say this Court should adopt this ludicrous result because three bills were introduced but never enacted in Congress in 1973-74 that would have provided treble damages for every violation of every section of the Commodity Exchange Act. The failure to enact these bills repealed the antitrust laws, defendants say, by evidencing a Congressional intention to eliminate a treble damages remedy for every antitrust violation that might also be argued to be also a Commodity Exchange Act violation, *i.e.*, a price-fixing conspiracy so large and vicious that it also violates the CEA, wins immunity from treble damages. P.B. pages 8-14.

However, the failure to enact these introduced bills, which were apparently never discussed in Congress, is not necessarily or reasonably suggestive of an intent to extirpate the antitrust laws. See A. p. 12. At most, it is suggestive of a Congressional intent neither to expand nor to contract any treble damage remedies. Therefore, defendants offer grossly insufficient evidence of legislative intent to obtain what they seek: the ludicrous immunization of a price-fixing conspiracy which was neither compelled nor permitted by the Commodity Exchange Act, and which is clearly prohibited by the Sherman Act.

The fundamental and important national policies embodied in the antitrust laws have been vindicated in this Court's repeated emphasis that repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and not to be casually inferred. *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963); *Pan American World Airways v. United States*, 371 U.S. 296, 304-05 (1963); *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962); *United States v. Borden Co.*, 308 U.S. 188, 197-206 (1939); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 314-15 (1897); *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1102 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 234 (1984); especially where the conduct giving rise to the claimed exemption is the result of a business decision (such as defendants' decision here to conspire to drive down potato futures prices and destroy the futures contract by defaulting, all in order to profit their businesses) and is not the product of regulatory coercion. *National Gerimedical Hosp. and Gerontology Center v. Blue Cross*, 452 U.S. 378, 390 (1981); *Otter Tail Power v. United States*, 410 U.S. 366, 374 (1973); *United States v. Radio Corp. of America*, 358 U.S. 334, 339 and 346 (1959).

Indeed, this distinction between governmentally-compelled action and voluntary, reprehensible price-fixing is even made in defendants' own case, *Terminal Warehouse Co. v. Penn R.*

Co., 297 U.S. 500 (1936). There the Court took pains to point out that insufficient facts existed to indicate any price-fixing or other conspiracy; that, had such facts been present, such violations would have been remediable under the Sherman Act and the Clayton Act, 15 U.S.C. § 15; and that, thus, the Court's true holding was that the fact record conclusively established that the discriminatory practice, "far from being a symptom of a large combination, was the product of a mistake of law which was shared for many years by the regulatory commission". *Id.* at 515-16.

Thus, this Court may well ask itself, where is defendants' claim of government compulsion? Or are they glibly proposing a ludicrous rule of statutory construction that would emasculate the antitrust laws in our regulated society by leaping from statute to statute and repealing the antitrust laws and immunizing classic price-fixing conspiracies wherever single damages could be argued to be available under a regulatory statute. Not only is the portion of the legislative history of the 1973-74 amendments of the Commodity Exchange Act which defendants point to an insufficient evidence of legislative intent, but other portions thereof conclusively demonstrate the Congress expressly retained (and did not reject) Sherman Act jurisdiction.

Thus, and first, during the process of enacting the 1974 amendments, the United States House of Representatives ("House") Agriculture Committee rebuffed intense efforts, and unanimously struck from the original draft of the 1974 amendments an exemption for commodity futures transactions from coverage under the antitrust laws. *See* Hearings on S.2485, S.2578, S2837 and H.R. 13113 before the United States Senate Committee on Agriculture and Forestry, 93rd Cong., 2nd Sess., at page 259 (hereinafter "Senate Hearings at ____"); Hearings on H.R. 11955 Before the House Committee on Agriculture, 93rd Cong., 2d Sess., at page 249 (1974); Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture, 93rd Cong., 1st Sess., at page 121 (1973). Con-

gress never again even considered an antitrust exemption provision.

Second, in creating Section 201(b) (Section 2 of the CEA today) of the bill it reported out (H.R. 13113), the House Agriculture Committee granted certain jurisdiction in favor of the proposed CFTC. The wording of this grant did not suggest to Agriculture Committee members arguments about an implied repeal because such members knew they had just unanimously eliminated all antitrust exemptions. The House's legal experts in the Judiciary Committee later became concerned, however, about implied repeal or preclusion of remedy arguments being wrongly implied from the wording as then phrased. Thus, and third, in order to set the matter straight, on May 14, 1974, Congressman Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, took time away from the historic Watergate matters then consuming his committee and all of Congress, to submit his testimony before the United States Senate Committee on Agriculture and Forestry; the sole reason for his concern, and that of the House Judiciary Committee, was the retention of antitrust jurisdiction over price-fixing in futures after passage of the new legislation. Congressman Rodino decried recent anticompetitive (price-fixing) practices in wheat, soybeans, and corn futures contracts apparently similar to (though not necessarily involving direct competitors in the use of the product) the alleged price fixing conspiracy here. A. p.13.

Furthermore, he extolled the importance, indeed the "urgency", of preserving the jurisdiction of antitrust laws over such anticompetitive practices in the commodity futures markets. Moreover, in page after page of analysis, he quoted various government studies similarly extolling the "urgency" of such jurisdiction. Finally, he urged that a specific proviso be inserted in the CEA so that "unequivocal" antitrust jurisdiction would be applied "unequivocally" to anticompetitive practices in commodity futures contracts, and so that any possibility of preclusion or implied repeal agreements would be

eliminated. Congressman Rodino successfully urged that a specific savings clause be inserted into the 1974 amendments to the CEA so as to insure that the antitrust laws applied unequivocally to commodity futures contract trading. A. pp. 12-14.

In a similar vein, Senator Herman Talmadge, Chairman of the Senate Agriculture Committee, later explicitly confirmed, and further evidenced, the specific Congressional intent to develop a provision preserving antitrust jurisdiction over the transactions here and to eliminate any possibility of preclusion or implied repeal arguments. In response to a Justice Department official's criticisms and suggestions similar to those of Congressman Rodino, Senator Talmadge emphasized that in his view neither his committee nor the House had any intention of depriving either state or federal courts from antitrust jurisdiction. Senate Hearings at 664.

The legislative history to the 1974 amendments is also replete with other evidence, from figures equal to and lesser than these Committee Chairmen, that Congress specifically intended to preserve antitrust jurisdiction and prevent preclusion or implied repeals. *See, e.g.*, Statement of Keith Clearwaters, Deputy Assistant Attorney General, Department of Justice (antitrust laws should continue to apply to commodity exchanges), Senate Hearings at 663; Statement of James T. Halverson, Director, Bureau of Competition, Federal Trade Commission (conduct which may have the approval of the CFTC should not be immune from scrutiny by the antitrust enforcement agencies), Senate Hearings at 667-68; Statement of Glenn Willet Clark, Professor of Law, Drake University Law School, Des Moines, Iowa (federal courts should retain antitrust jurisdiction over conduct regulated by the CFTC), Senate Hearings at 683-84.

Thus, Congress laid to rest any doubts about the "unequivocal" application of the antitrust laws over anticompetitive practices in commodity futures contracts upon the conclusion of the 1974 hearings, by inserting and enacting the antitrust

preservation proviso recommended by Congressman Rodino to preserve antitrust jurisdiction over anticompetitive practices in corn futures contracts, soybean futures contracts, wheat futures contracts, and—we respectfully submit—over the potato futures contracts at bar. It reads as follows: "Nothing in this Section shall supersede or limit the jurisdiction conferred on Courts of the United States or any State." Section 2(a)(1) of the CEA, 7 U.S.C. Section 2. As the legislative history quoted at length above has shown, by this specific proviso, Congress specifically intended to preserve, and did preserve, Sherman and Clayton Act antitrust jurisdiction over the classic price-fixing conspiracy here. This proviso and the clear Congressional intent behind it clearly mandate that certiorari be denied and that defendants be liable for their antitrust violations here. *See* 120 Cong. Rec. 30,459, 34,997 (1974).

POINT III

THERE ARE NO CONFLICTS BETWEEN CIRCUIT COURTS; THERE ARE NO MEANINGFUL CONFLICTS ON THE FACTS UNDER THE CITED CASE; THE DISTRICT COURT DECISION ASSERTED TO CAUSE CONFLICTS IS INFIRM AND IGNORED CONTROLLING LAW IN ITS OWN CIRCUIT; AND, EVEN IF THERE WERE CONFLICTS, THE STATUTE HAS BEEN AMENDED IN MATERIAL RESPECTS

A. There Are No Conflicts Between Circuit Courts

Defendants' next reason for certiorari is that "a conflict exists between the Second and Seventh Circuits on the issue of treble" damages and on "the appropriate approach to statutory construction and application." P.B. Point II. Defendants are as wrong here as they are on the other points.

First, defendants' own argument reveals that *all* decisions in all Circuits reject treble damages in the securities manipulation context (no conflicts here) and that only one district court decision has rejected the antitrust laws in the commodity

futures context (see *infra*). Therefore, no conflicts exist between circuit courts.

B. There Is No Meaningful Conflict and No Conflict On the Facts

Second, the courts which have considered any price-fixing conspiracy or facts similar to the facts proved here, have agreed with the courts below that no antitrust immunity exists. *See Pollock v. Citrus Assoc.*, 512 F.Supp. 711, 716 (S.D.N.Y. 1981) *Strax v. Commodity Exch., Inc.*, 524 F.Supp. 936 940 (S.D.N.Y. 1981); *Goldschmidt v. Hunt*, 556 F. Supp. 123 (N.D. Tex. 1983); *Apex Oil Co. v. Joseph DiMauro*, 82 Civ. 1796 (S.D.N.Y. July 29, 1983), (unreported memo decision). Therefore, no conflict exists.

Further, defendants' asserted conflict is not meaningful. This asserted conflict arises from one lone district court decision, *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979). *Smith* primarily involved bucketing of orders, not price-fixing, and held over six years ago that the antitrust laws were precluded. Thus, it is different on the facts. Today, *Smith v. Groover* stands by itself: the first decision written on this subject, *albeit* on different facts, and the *only* one to find the antitrust laws precluded. The decisions written since then have explicitly rejected the reasoning of *Smith v. Groover*. Therefore, *Smith v. Groover* simply cannot serve to suggest a conflict warranting certiorari here. *See Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-3 (1923).

C. Smith v. Groover is Infirm and Ignores Controlling Law In Its own Circuit.

Apart from its rejection by all other courts, *Smith v. Groover* suffers from an internal infirmity: it relies on and attempts to import wholesale into an analysis of the Commodity Exchange Act, the analysis of the securities laws by the decisions in *Schaefer v. First National Bank of Lincolnwood*,

326 F. Supp. 1186 (N.D. Ill. 1970) and 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). First, nowhere in all the law could an analogy to an entirely different statutory scheme be more meaningless than in the area of finding an implied repeal of the antitrust laws, where each statute must be analyzed on its merits. See Point II *supra*.

Second, in the passage of the Securities Exchange Act of 1934 (the "1934 Act"), Congress expressly intended to define and limit the right of action for stock manipulation, see 15 U.S.C. Section 78i(e), Section 9a(e) of the 1934 Act (express action and attorneys' fees permitted) but *Congress included NO* such limitations or express actions in the CEA it passed in 1974 and that was analyzed by the Court below. Similarly, in passing the 1934 Act, Congress intended courts to have "exclusive jurisdiction" of stock manipulation under the 1934 Act, and to limit to "actual damages" all recoveries in private actions involving stock manipulation. See 15 U.S.C. Section 78aa and 15 U.S.C. Section 78bb, Sections 27 and 28 of the 1934 Act. Again, nothing similar existed in the CEA. Finally, no cases predating the 1934 Act had applied the antitrust laws to securities markets—again, precisely the opposite of the situation regarding the CEA. All of these considerations were expressly relied on as part of the rationale for the *Schaefer* court decisions, see 326 F.Supp. at 1192 and 509 F.2d at 1300-01.

Finally, as we have already seen, Congress did expressly intend to reach commodity futures in passing the Sherman Act (Point I *supra*), and did expressly intend to preserve this jurisdiction in passing the CEA (see Point II *supra*). Similarly, the Seventh Circuit had previously recognized antitrust private treble damage suits against futures market manipulations, *see Peto v. Howell*, *supra*, but the *Smith* court apparently ignored even this controlling law in its own circuit.

Comparing these infirmities and all the other distinctions of *Smith v. Groover* to the decision and situation here, we see that there is no meaningful conflict, particularly under defen-

dants' cited case, *Shapiro v. United States*, 335 U.S. 1 (1948). *Shapiro* accompanied an appeal (not certiorari) which the Court took for review in *United States v. Hoffman* 335 U.S. 77 (1948); unfortunately, defendants do not reveal or deal with this in their brief, although they do cite to a page in the *Hoffman* opinion without even mentioning that it was a separate case and decision. Moreover, again totally unlike the situation at bar, the Court was there faced with two contemporaneous, directly conflicting lower court decisions. Finally, and again totally unlike the situation at bar, the Court still felt compelled to emphasize that the compulsory testimony statute there at issue was essentially incorporated into twenty-seven (counsel's count) individually enumerated federal statutes and that the conflict there at issue could be expected to be occurring often. *Shapiro*, *supra*, 335 U.S. at 6-7 fn. 4. Thus, the certiorari circumstances of *United States v. Hoffman* are far different from those here such that the absence here of the important factors there would seem to compel denial of certiorari.

Therefore, no erroneousness exists in the decision below; no conflict exists in the circuits courts; and no meaningful conflict exists between any courts under even defendants' cited cases.

D. Even if a Conflict Did Exist, The Statute Has Been Amended.

Even if a conflict did exist, the CEA was amended by the Futures Trading Act of 1978, 92 Stat. 865 (1978), and the Futures Trading Act of 1982, 96 Stat. 2294 (1983). The Court below took pains to emphasize that those amendments were not at issue because the price-fixing conspiracy occurred in 1976. See A.7. fn. 1. Therefore, the statutes are different; moreover, they are materially different. The latter amendments were adopted in response to futures industry lobbying after *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) had upheld implied private rights of action under the CEA. Futures brokers sought, and obtained, express rights of action, with recovery limited to only the actual

damages suffered, and new elements imposed in order to establish liability. Various other alterations in the statutory scheme were made which expressly excluded or otherwise affected other remedies and jurisdiction. Therefore, certiorari should obviously be denied. Compare *United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 932 (1952); *Sokol Bros. Co. v. Commissioner*, 340 U.S. 952 (1951); *United States v. Beal*, 340 U.S. 852 (1950); *United States v. Wilkinson*, 355 U.S. 839 (1957); as described in *Berger v. United States*, 170 F.Supp. 795 (S.D.N.Y. 1959).

POINT IV

DEFENDANTS' LAST ARGUMENT FOR CERTIORARI IS INSUBSTANTIAL

Defendants' last argument for certiorari is that the decision below will open the courts to numerous decisions which are incorrect in unspecified ways. This argument requires no response because, as has already been demonstrated, the decision below was correct regarding the facts, the legislative history to the Sherman Act, the numerous previous applications by courts of the Sherman Act to the commodity futures markets, and the 1973-74 amendments to the Commodity Exchange Act which serve to preserve that jurisdiction.

Contrary to defendants' ludicrous assertion (P.B. p.5), numerous courts have previously recognized a general principle upholding antitrust claims where the conspiracy involved was so large that it also violated a regulatory statute. *See, e.g., Terminal Warehouse Co.* v. *Penn. R. Co., supra*; *MCI Communications* v. *American Tel. & Tel. Co., supra*; *see also* cases cited in Point II generally. And, of all the different commercial contexts and different conceivable combinations of regulatory statute and antitrust considerations, nowhere could this general principle possess a more just, economically sound, and socially wise application than to the vicious price fixing conspiracy

perpetrated by the petitioners at bar in order to depress prices and destroy a market via the largest default in history of the commodity markets. Nowhere could this principle find a more legally sound basis than in the instance of the 1973-74 amendments to the Commodity Exchange Act which expressly sought to retain "unequivocally" court jurisdiction over Sherman Act violations, which themselves were enlarged expressly in order to be sure to outlaw the vicious conspiracy here.

CONCLUSION

The decision below is very sound and very just; there are no conflicts between the circuits and no meaningful conflicts between any courts whatsoever; the petition is an affront to the process; and certiorari should be denied in all respects.

Dated: New York, New York
October 31, 1985

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No. 85-571

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Petitioners,

v.

JOSEPH STROBL,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 12, 1985

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IN THE

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OCTOBER TERM, 1985

No. 85-571

JOHN R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Petitioners,

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

Petitioners John R. Simplot, J.R. Simplot Company, Simplot Industries, Inc., P.J. Taggares, P.J. Taggares Company and SimTag Farms (the "Petitioners")[1] respectfully submit this Reply Brief in support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed October 2, 1985, and in response to the Brief in Opposition of respondent Joseph Strobl ("Strobl") filed October 31, 1985.

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1 Pursuant to Rule 28.1 of this Court, Petitioners state as follows: the J.R. Simplot Company is a privately held corporation; Simplot Industries, Inc. is a wholly owned subsidiary of the J.R. Simplot Company; SimTag Farms was a private joint venture; and the P.J. Taggares Company is a privately held corporation.

REPLY ARGUMENT

INTRODUCTION

Respondent Strobl does not deny that this is a case of first impression with ramifications that reach far beyond this case itself. His brief is not really an argument against the importance of review by this Court, instead it is a plea for summary affirmance without full briefing and argument.

A substantial portion of Strobl's brief consists of a pejorative attack on the petitioners, as if this somehow should relate to the question of whether this Court should grant certiorari. Strobl labels the petitioners' conduct as "vicious" (Strobl Br. at 1, 5, 21)[2] and as having "tentacles in both the cash and futures . . . markets" (Strobl Br. at 12). Strobl asserts that Simplot and the Simplot Company had previously been convicted of a felony (Strobl Br. at 3) and that petitioner Taggares encouraged a broker to join in the "conspiracy" (Strobl Br. at 4). Refusing to confine his invective to petitioners, Strobl calls the petition itself an "affront" to the certiorari process (Strobl Br. at 5, 22).

Quite aside from its irrelevance, Strobl's invective is false. Simplot and the Simplot Company have never been convicted of any felony and no proof of such a conviction was ever offered at trial. Taggares did not encourage any broker to join in any "conspiracy" and there was no finding that he did. Nor was there any finding that Simplot and Taggares were involved in any conspiracy involving physical Maine potatoes.[3] And, far from being any "affront" to the certiorari process, the instant petition should be seriously considered by this Court.

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2 References in the form "Strobl Br." are to respondent's brief.

3 Strobl's irresponsible statements require mention that Chief Administrative Law Judge Hunt of the CFTC found, in separate administrative proceedings, that Simplot and Taggares did *not* engage in a "short" conspiracy, *In re Taggares, et al.*, CFTC Docket No. 77-13 (June 22, 1982), and that, in fact, it was the "longs" who manipulated the Maine potato futures contract in question. *In re Collins*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,960 (CFTC 1984).

REPLY POINT I

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION CONFLICTS WITH OBVIOUS CONGRESSIONAL INTENT

Strobl claims that the Second Circuit's decision comports with the intent of the drafters of the 1974 Amendments to the CEA[4] (Strobl Br. at 12-17). Strobl concedes, as he must, that Congress, in 1974, rejected three bills providing for treble damage recovery for conduct violative of the CEA. He asserts, however, that the threefold rejection by Congress implies nothing more than an intent neither to expand nor contract any treble damage remedies (Strobl Br. at 13). Such an assertion is specious, given the comprehensiveness of the 1974 Amendments to the CEA (*Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356 (1982)) and Congress' provision for recovery of single damages only for conduct proscribed by the CEA (Petition at 8-9).[5]

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4 References in the form "CEA" are to the Commodity Exchange Act, as amended by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, *codified at* 7 U.S.C. § 1 *et seq.* Although the CEA was further amended by the Futures Trading Act of 1978, 92 Stat. 865, and by the Futures Trading Act of 1982, 96 Stat. 2294, *codified at* 7 U.S.C. § 1 *et seq.*, the Second Circuit correctly observed such post-1974 amendments to the CEA are not relevant here "because the activities at issue all occurred prior to their enactment." (A-7; 768 F.2d at 26).

5 Strobl fails to rebut Petitioners' demonstration that cases decided before the 1974 Amendments to the CEA, and relied upon by the court below, lend no support whatsoever for a treble damage award for conduct proscribed by the CEA (Petition at 13). Although he does point to one decision, *Peto v. Howell*, 101 F.2d 353 (7th Cir. 1938), his reliance upon that case is unavailing because it involved a corner of a physical commodity, a classic Sherman Act restraint of trade in goods. Even the Second Circuit makes no mention of *Peto v. Howell*, undoubtedly because of its manifest irrelevance.

REPLY POINT II

CERTIORARI SHOULD BE GRANTED BECAUSE A CONFLICT EXISTS BETWEEN THE SECOND AND SEVENTH CIRCUITS BOTH ON THE SPECIFIC ISSUE OF TREBLE DAMAGE RECOVERY AND ON THE APPROPRIATE APPROACH TO STATUTORY CONSTRUCTION AND APPLICATION

Strobl contends that there is no conflict between circuit courts (Strobl Br. at 17-18). Although this is true in a literal sense because the pertinent decision in the Seventh Circuit was rendered by a district court (*see Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979)), it is undeniable that the holding in *Smith* was compelled by the reasoning of that Circuit on the precise issue, albeit with regard to securities and not futures contracts (Petition at 11-12).

Strobl simply dodges Petitioners' related argument that the decision of the Second Circuit flies in the face of the specific remedy rule—a fundamental canon of statutory construction enunciated by this Court[6] and followed by the Seventh Circuit in *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), and the court in *Smith v. Groover*, *supra*. By permitting Strobl to recover treble damages under the generic provisions of the antitrust laws, the Second Circuit has violated the specific remedy rule. Indeed, the Second Circuit expressly refused to apply the specific remedy rule in making its determination (A-16; 768 F.2d at 30).

Strobl also contends that the incipient conflict between *Smith v. Groover*, 468 F. Supp. 105 (N.D. Ill. 1979) and the

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6 *See, e.g., Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957), *quoting with approval, Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (citation omitted); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961), and *see* Petition at 13-14.

decision of the Second Circuit is not significant.[7] First, Strobl asserts that *Smith* is distinguishable from the instant case on its facts (Strobl Br. at 18). This is nonsense. The Second Circuit explicitly recognized that the factual situation in *Smith* is "in all important respects identical to the one here." (A-14; 768 F.2d at 29). Second, Strobl states that *Smith* is the sole case in Petitioners' favor (Strobl Br. at 18). That argument misses the mark. Quite apart from the fact that *Smith* favors Petitioners on the precise issue of the interaction between the specific remedial provisions of the CEA and the generic provisions of the federal antitrust laws, *Smith's* statutory analysis is compelled by a long line of specific remedy rule cases propounded by this Court (*See* footnote 6 *supra*; Petition at 11-14). *Smith* is also compelled by numerous cases relating to the inability of a private litigant to recover treble damages in a closely analogous area—the securities field. *See, e.g., Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975); *see* Petition at 15 n.10.[8]

Strobl then proceeds to attack the holding in *Smith* by claiming, without substantive explanation, that *Smith's* reasoning is defective (Strobl Br. at 18-19). Although Strobl concedes that a private litigant may not recover treble damages for securities manipulation, he contends that *Smith's* reliance

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7 It is misleading, tricky really, for Strobl to imply that the existence of an incipient conflict with respect to an important and significant issue does not merit review by this Court. Indeed, his argument is completely undercut by *Shapiro v. United States*, 335 U.S. 1 (1948). *Shapiro* involved a writ of certiorari to the Second Circuit based upon a conflict between the Second Circuit and a district court decision in the District of Columbia Circuit. The district court case was appealed to the Supreme Court and was considered as a companion case to *Shapiro. See United States v. Hoffman*, 335 U.S. 77 (1948).

8 Strobl relies on *Terminal Warehouse Company v. Penn. R. Co.*, 297 U.S. 500 (1936) for the proposition that application of the antitrust laws overcomes the specific remedy rule. However, in *Terminal Warehouse*, Mr. Justice Cardozo limited plaintiff to the specific remedy provided under the Interstate Commerce Act (the "ICA"), notwithstanding the plaintiff's desire to recover treble damages under the federal antitrust laws for conduct specifically proscribed by the ICA.

on the rule of law precluding recovery of treble damages for securities manipulation has no application to the manipulation of commodities futures. Strobl's contention is bereft of merit because the fundamental similarity between commodities and securities "has been repeatedly recognized by Congress . . . by the courts . . . by the CFTC . . . and by the commentators." *See Leist v. Simplot*, 638 F.2d 283, 298 n.14 (2d Cir. 1980) *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982). Not surprisingly, Strobl is unable to cite a single case in support of the spurious distinction that he chooses to draw between the regulation of the commodities and securities industries.

Finally, Strobl makes the argument that the 1978 and 1983 Amendments to the CEA somehow extinguish the necessity of reviewing the issues in this Petition. That argument makes no sense because the Second Circuit itself recognized that "[t]hese amendments are not relevant to . . . the activities at issue." (A-7; 768 F.2d at 26). The Second Circuit was correct on this point because neither the 1978 nor the 1983 amendments to the CEA provide for a treble damage remedy and their enactment have no bearing upon the the significant issues of first impression raised by this Petition.

REPLY POINT III

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION INTRODUCES DISPARITY IN THE APPLICATION OF FEDERAL LAWS TO ESSENTIALLY IDENTICAL INVESTMENT ACTIVITY

According to Strobl, common shares are nothing but pieces of paper, whereas commodities futures are somehow imbued with greater economic importance because they represent con-

tracts for the delivery of the actual commodity (Strobl Br. at 6-7). No meaningful support is given for this proposition because none exists. And, Strobl fails to explain why inconsistent standards should be imposed upon inherently similar industries that are already subject to far-reaching regulation. *See, e.g., United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975). Nor do the pre-1974 reports of various government agencies, string cited at pages 10-11 of Strobl's brief, provide any justification for such a result.

REPLY POINT IV

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT HAS ANNOUNCED A STANDARD FOR TREBLE DAMAGE RECOVERY IN A FEDERALLY REGULATED AREA WHICH HAS CONSEQUENCES REACHING FAR BEYOND THIS CASE

Strobl does not take real issue with Petitioners' argument that the standard articulated by the Second Circuit has far-reaching consequences. He argues that the standard was properly applied in this case. That begs the argument that a standard, with such far-reaching consequences, should be the subject of review by this Court, especially when the lower court applied the standard in the context of a unique issue of first impression (Petition at 16).

CONCLUSION

Strobl's plea for summary affirmance should be rejected and certiorari should be granted.

Dated: New York, New York
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